(4) (5)

Nos. 90-1361, 90-1484

In The

Supreme Court of the United States

October Term, 1990

HOLYWELL CORPORATION, ET AL.,

Petitioners,

vs.

FRED STANTON SMITH, LIQUIDATING TRUSTEE, ET AL.,

Respondents.

UNITED STATES OF AMERICA,

Petitioner,

vs.

FRED STANTON SMITH, LIQUIDATING TRUSTEE, HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, THEODORE B. GOULD, and THE BANK OF NEW YORK,

Respondents.

Petitions for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION OF RESPONDENT, THE BANK OF NEW YORK

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April 1991

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QUESTION PRESENTED

Whether a liquidating trustee, appointed pursuant to a confirmed plan of reorganization in five consolidated bankruptcy cases, is obligated to ascertain and pay income taxes on behalf of the debtors when (a) no such tax liabilities were scheduled by the debtors, (b) the confirmed plan made no provision for any such taxes, (c) the Internal Revenue Service filed no objection to the plan, (d) the Internal Revenue Service filed no proof of claim with respect to any such taxes, (e) the Internal Revenue Service never proved that any tax was or is payable, (f) the liquidating trustee acted merely as a disbursing agent exercising ministerial authority, and not as a receiver, and (g) the discharged debtors remained in existence and in possession of their books and records?

ENTITIES RELATED TO RESPONDENT, THE BANK OF NEW YORK

BNY Holdings (Delaware) Corporation

The Bank of New York (Delaware)

The Bank of New York Overseas Finance, N.C.

Affinity Group Marketing, Inc.

ARCS Mortgage Corp. (Fla.)

ARCS Mortgage, Inc. (Calif.)

BNY Leasing, Inc.

Eastern Trust Company

The Bank of New York Life Insurance Co., Inc.

Capital Trust Company

BNY Financial Corporation

BNY Personal Brokerage, Inc.

Beacon Capital Management

The Bank of New York Trust Company, Inc.

The Bank of New York Trust Company of California

The Bank of New York Trust Company of Florida, N.A.

Leonard Newman Agency, L.P.

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INTRODUCTION

Respondent, The Bank of New York (the "Bank"), respectfully opposes the petitions for certiorari filed and served by five debtors in Chapter 11 cases (Case No. 90-1361) and by the United States of America on behalf of the Internal Revenue Service ("IRS"; Case No. 90-1484). The Bank was granted leave to file this consolidated brief in opposition to both petitions.

Three courts below have reached the identical result based on detailed findings of fact. This Court does not grant certiorari to review evidence, and the petitions should therefore be denied.

STATEMENT

A. Statement by the Debtors

The statement by the debtor/petitioners in Case No. 90-1361 is incomplete and inaccurate.[1]

1. Procedural Matters

This petition is the ninth – and apparently not the last – such petition filed by these debtors over the past three years.[2] One such petition (Case No. 87-1988) sought review of the court of appeals' dismissal as moot of the debtors' appeal from the confirmation of the plan of reorganization (the "Plan") proposed by the Bank and overwhelmingly approved by the 400-plus creditors in

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[1] This is unintentional, no doubt, and a natural result of the fact that the counsel for the petitioners in this Court are the fifth firm of lawyers to represent the debtors; these counsel did not represent the debtors at trial, in the appeal to the district court, or in the briefing and oral argument in the court of appeals before that court's September, 1990 opinion. Relief pitching in the late innings is difficult work.

[2] The prior petitions were in Cases No. 87-1988, 87-1989, 88-80, 89-708, 89-864, 89-917, 90-676, and 90-761; each was denied.

1985. This Court denied further review, so the legal sufficiency of the Plan and the propriety of the confirmation order are not now subject to further challenge.[3]

The court of appeals denied a further stay of the opinion regarding income taxes now sought to be reviewed, denied rehearing, and denied rehearing en banc; neither the circuit judge who issued a dissenting opinion nor any other judge of the circuit voted for rehearing (App. 41a).[4]

Undaunted, the debtors sought a further stay here (Application No. A-546), which was promptly denied by Justice Kennedy.[5]

2. The Facts

The disposition of this case below is based upon an extraordinary record. The debtors, recognizing that "this Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts",[6] have omitted the salient facts:

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[3] *In re Holywell Corp.*, 54 Bankr. 41 (Bankr. S.D. Fla. 1985), *aff'd*, 59 Bankr. 340 (S.D. Fla. 1986), *appeal dismissed*, 838 F.2d 1547 (11th Cir. 1988), *cert. denied*, 488 U.S. 823 (1988).

[4] References to the debtors' appendix are by "App. ___a"; the Bank's appendix is referred to by "Bank App. B-___"; and the Liquidating Trustee's appendix is referred to by "Liq. Tr. App. ___a".

[5] Liq. Tr. App. 15a. The denial of a stay application in a civil case is appropriate if the Court concludes that it is not likely that four Justices are likely to grant certiorari. *Coleman v. Paccar*, 424 U.S. 1301, 1302 (1976); *Edelman v. Jordan*, 414 U.S. 1301 (1973).

[6] *Rogers v. Lodge*, 458 U.S. 613, 623 (1982). This rule is even more compelling where, as here, issues of fact have been found and reviewed at three (bankruptcy court, district court, and court of appeals) levels rather than two levels before submission to this Court.

(a) Neither the plans of reorganization proposed by the debtors nor the Plan proposed by the Bank made any provision for the payment of income taxes (App. 29a), and each was served upon the IRS. The IRS never objected to either and has not demonstrated to this day that any tax is due. The Bank's Plan was confirmed by the creditors and the bankruptcy court, while the debtors' proposed plans were rejected by the creditors and the court.

(b) In 1985, before confirmation of the Bank's Plan, the debtors objected to the Plan because it did not provide for payment of taxes on any gain realized by the debtors from the post-petition (but pre-confirmation) sale of three properties (the "Washington Properties"). The bankruptcy court advised the debtors in open court that the debtors had failed to introduce any evidence of adverse tax consequences. The bankruptcy court invited the debtors to introduce such evidence and seek a modification of the Plan [Bank App. B-49], but the debtors never did.

(c) In reliance upon the order of confirmation and without knowledge of a legal challenge or income tax claim by the IRS, the Bank and the Liquidating Trustee substantially consummated the Plan on October 10, 1985. As part of that reliance, and as provided by the Plan, the Bank (i) permitted the release of over $30 million of its cash collateral to the Liquidating Trustee so that other creditors could be paid, and (ii) advanced over $13.6 million in new cash as part of the purchase price for the Miami Center Project. In further reliance on the silence of the debtors and the IRS as to income taxes, the Liquidating Trustee made payments in full to some 400 creditors. *Holywell, supra*, 838 F.2d at 1550.

(d) The debtors pursued an appeal from the confirmation order, but the district court affirmed. The court of appeals and this Court denied further review. The IRS, however, never appealed the order confirming the Plan and never sought a stay of the consummation of the Plan.

(e) Contrary to its own standard Internal Revenue Manual ("IRM") procedures,[7] the IRS made no investigation and filed no proof of claim with respect to any alleged tax liability.[8]

(f) In 1986 and 1987, well after confirmation and substantial consummation of the Plan (and well after the allegedly-taxable real estate transactions), the debtors and their outside, "Big Eight", accountants took the position in writing that the Liquidating Trustee of the Miami Center Liquidating Trust was not required to file returns or pay income taxes with respect to the debtors' income.[9] When they decided that it would be more advantageous to them to try to foist off any tax liability on the creditors rather than to file a return and pay the taxes, the debtors changed position.

(g) Neither the debtors nor the IRS proved at trial what income taxes, if any, are owed. At trial, the IRS and the debtors made no record on this point. The estimates of taxable income recited by the debtors at page 6 and footnote 5 of their petition are not part of the proof below. The IRS documents referred to by the debtors (1) were never part of the record at trial,[10] (2) are disputed by the

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[7] IRM 57(13); pertinent excerpts are attached as Bank's App. B-1 through B-32.

[8] These omissions are detailed in the lower court opinions at App. 8a (court of appeals), 21a-22a (district court), and 30a (bankruptcy court).

[9] Trial exhibits 2, 3, and 4; attached as Bank's App. B-33, B-35, and B-38.

[10] The debtors mislead the Court in footnote 5 at page 6 of their petition. The IRS reports referred to there were not a part of the trial record. They were filed with the court of appeals (by Mr. Gould, *pro se*), without any leave to amend the record. The documents have not been authenticated by an IRS witness, nor have they been the subject of cross-examination by any party. They related to a partnership (debtor Miami Center

(Continued on following page)

debtors themselves,[11] and (3) lack the other elements (deductions, adjustments, credits, loss carryforwards, and other values that affect the computation of income tax actually owed) necessary to permit the assessment of a specific dollar amount of taxes for a particular debtor for a particular tax year. "A tax cannot be found 'legally due and owing' by the debtor until enough is known of its basis to make the tax computable or knowable, when all facts necessary for its calculation are knowable".[12] The IRS never took discovery or engaged in any other effort in these cases to fix a specific amount of tax liability.

(h) The debtors doggedly characterize the Liquidating Trustee as a "trustee" having "a full panoply of powers". In reality, however, the Liquidating Trustee and Miami Center Liquidating Trust were created by the terms of the Plan as a mechanism for the liquidation and disbursement of allowed claims as defined in the Plan. A

(Continued from previous page)

Limited Partnership, or "MCLP") which is not itself a taxpayer under any scenario (partnerships are conduits and do not pay taxes; each partner reports and pays taxes on his or her percentage of the partnership's gain, loss, credit, etc.). And, above all, they do not show any amount of tax to be payable by any debtor for any year.

[11] The debtors are caught in a poignant dilemma. If certiorari is denied, they will be responsible for any taxes in accordance with the three opinions below. Thus, the Court will not find the debtors conceding that any specific sum of tax is due. However, if no specific sum of tax is due, there is no basis or need for further review by this Court. In an effort to keep one leg on each of these rapidly diverging horses, the debtors refer to six or seven multi-million dollar figures that relate to particular line items of a tax return (gain and loss, for example) but not to any ultimate sum of tax purportedly payable. One needs all the line items of a return, and not just one or two of the line items, to know whether any tax is payable.

[12] *In re Childress*, 59 Bankr. 828, 830 (Bankr. N.D. Ill. 1986).

Bankruptcy Code "trustee" connotes a Court-appointed officer with all of the authority, discretion, and power described in Title 11, United States Code. The Plan in this case confers no such statutory powers on the Liquidating Trustee. The bankruptcy court found as a matter of fact that the Liquidating Trustee's duties were merely, "to pay the debtors' indebtedness in a manner specified by the plan" (App. 32a). Similarly, the district court found that the Plan assigned to the Liquidating Trustee certain "limited and essentially ministerial functions" (App. 24a). The court of appeals reached the same conclusion (App. 11a). The record below shows that the Liquidating Trustee has not operated a business or exercised any discretion.[13] Instead, the record supports the findings of fact below that the Liquidating Trustee's functions were limited and ministerial.

B. Statement by the IRS

1. Procedural Matters

The petition of the Solicitor General on behalf of the IRS urges the Court to overlook the IRS's departures from well-settled procedural requirements in bankruptcy. Having lost on the facts in the three courts that have considered the matter, the IRS now asks this Court for a special dispensation from those procedural requirements.

Although the IRS received the petitions in bankruptcy in 1984 and the plans, disclosure statements, and confirmation order approving the Bank's Plan in 1985, the Liquidating Trustee's adversary proceeding in late 1987 was the first time that any potential tax liability of the Liquidating Trust was raised. Until that proceeding, the IRS had done nothing with respect to the matter. The district court detailed the IRS's procedural omissions:

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[13] For example, the settlement of any disputed claim has always been brought to the bankruptcy court for review and approval.

> **The IRS filed no objections to the Plan or disclosure statement [App. 18a].
>
> **The IRS did not appeal the confirmation of the Plan [App. 19a].
>
> **The IRS failed to file any proof of claim for any such income taxes in the manner, and within the time, specified by the Bankruptcy Code, the Plan, and the bankruptcy court. [App. 32a].[14]

2. The Facts

The IRS's petition relegates to footnotes the very facts that were the gravamen of the three decisions below.

Footnote 2, page 4 of the IRS petition concedes that, "the government filed no objection to the confirmation of the plan and did not participate in the appeals of the confirmation order". The footnote omits to disclose the equally-inexplicable failure of the IRS to file a proof of claim with respect to the allegedly-due taxes.

Footnote 4, page 6 of the IRS petition concedes that:

> No determination of the tax liability of any party had then been made by the IRS with respect to such gains and investment income, although the taxes would evidently be substantial.

The footnote omits to report that no determination of tax liability has ever been made by the IRS for the

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[14] This lapse by the IRS continues to this day. The IRS's failure to file a timely proof of claim and to follow its own Internal Revenue Manual ("IRM") procedures also resulted in the loss of a $3.2 million pre-petition tax claim in these cases. *In re Holywell Corp.*, 68 Bankr. 203 (Bankr. S.D. Fla. 1986), *aff'd* in *United States v. Holywell Corp.*, Case No. 87-0968-Civ-Davis (S.D. Fla. 1987) (unreported opinion attached at App. B-40). The United States wisely dismissed its appeal to the court of appeals in that case, but has for some reason chosen to persist with the equally-fatal facts of the petition here.

debtors. Speculation that the taxes would "evidently be substantial" is the IRS's way of admitting that it still has no idea, seven years after the bankruptcies began, what amount of taxes might be due for the two corporate and one individual debtor/taxpayers.

Further, the IRS has never proven that the debtors will be unable to pay any such liability (if and when the IRS establishes any such liability). The IRS's concern for the public fisc must be viewed in light of the IRS's failure to assess any taxes against the debtors.

SUMMARY OF ARGUMENT

Petitioners attempt to portray the issue in this case as one of critical importance to the Internal Revenue Service's ability to safeguard the public fisc. That simply is not true. *No one disputes that the IRS had a full opportunity to protect its interest in tax collection by presenting to the bankruptcy court its contention that taxes should be paid out of the assets placed in the Liquidating Trust.* Indeed, Section 1129(d) of the Bankruptcy Code, 11 U.S.C. § 1129(d), specifically authorizes a governmental unit to object to a reorganization plan on tax avoidance grounds. If the IRS's interest could be protected only by payment of taxes out of the assets in question, the bankruptcy court could have refused to approve the reorganization plan unless it was modified to include such a provision. Significantly, the IRS's own administrative manual requires the Service to monitor filings in Chapter 11 cases and ensure that proposed reorganization plans adequately protect the government's interest.

In fact, of course, neither the IRS nor the debtor ever raised the issue before the bankruptcy court. Although both parties were fully aware of the contours of the proposed reorganization plan, neither pressed an objection to the plan on the ground that it did not sufficiently protect the IRS's interest. After the plan was approved, the Liquidating Trustee began to disburse the trust's assets to creditors in accordance with the reorganization

plan, which contemplates payment of all claims in full. In addition, some creditors released their claims to certain of the debtors' assets.

What this case is really about, therefore, is whether the IRS is entitled to multiple bites at the tax collection apple. Having remained silent at the time the reorganization plan was being formulated, and now faced with the decisions of three courts holding that it does not have the right to assert a claim under the Plan, the IRS attempts to rely on statutory authority independent of the Plan to impose upon the Liquidating Trustee tax obligations that are outside the scope of his authority. That result could, of course, require the few remaining unpaid creditors to shoulder the entire tax liability, if any is found to exist, with the result that they might have to accept much less than the full payment received by other creditors and contemplated by the reorganization plan. Had the creditors been aware of the possibility that the payments contemplated by the Plan would not take place as a result of the diversion of some of the trust's assets to the IRS, it is difficult to believe that the Plan would have been approved.

Nothing in the statutory provisions cited by petitioners mandates that result. These provisions require that returns be filed by *statutory* bankruptcy trustees or others exercising similarly broad authority over the debtor's assets. The three courts below correctly found that the "essentially ministerial function" performed by the Liquidating Trustee does not satisfy that test.

Petitioners' entire argument reduces to the assertion that, because *other* types of trustees must file returns and pay taxes, the Liquidating Trustee must do so as well. But the line drawn by the court of appeals is entirely rational and rests squarely on the particular factual findings in this case: it would be inequitable to require an individual or entity to file returns and pay taxes where that individual or entity lacks authority to do so under a reorganization plan sanctioned by the bankruptcy court. The result

urged by petitioners would require the Liquidating Trustee to violate the terms of the trust agreement and would upset the expectations of the parties to the bankruptcy proceeding.

Not only that, the distinction drawn by the court of appeals accords with established precedent. Petitioners have not pointed to a single case in which an individual or entity exercising the limited authority of the Liquidating Trustee has been required to file returns. Rather, all of their cases involve statutory trustees or others exercising broad authority. The court of appeals – which was well aware of the cases relied on by petitioners here – properly concluded that a different result was appropriate because of the different facts of this case. No other court of appeals has even addressed the question, let alone reached a contrary conclusion.

The question presented in this case, therefore, is whether the court of appeals – in what is apparently the first appellate decision to address the question – erred in concluding that Section 6012(b) does not apply to ministerial functionaries like the Liquidating Trustee. In view of the unique factual circumstances of this case – on which the court of appeals expressly grounded its decision, the absence of a conflict among the lower courts, and the wholly speculative nature of petitioners' claims regarding the practical importance of the issue presented for review, the petitions for a writ of certiorari should be denied.

ARGUMENT

THE PETITIONS FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

A. The IRS Failed In This Case To Avail Itself Of The Well-Established Bankruptcy Court Procedures That Enable The IRS To Safeguard The Public Fisc.

In order to evaluate the legal merits – and the asserted practical importance – of the question presented

in the certiorari petitions, it is necessary to understand the relevant background, both the pertinent provisions of the Bankruptcy Code and the events in this case. That background makes clear that conventional bankruptcy procedures grant to the IRS undisputed authority to ensure the payment of any and all taxes that might be due. Because the IRS repeatedly failed to avail itself of those procedures in this case, it seeks here to supplement its authority in a manner not contemplated by Congress.

Chapter 11 of the Bankruptcy Code allows a debtor to reorganize his business by, for example, restructuring his debt, and emerge from bankruptcy as an ongoing concern. Upon the filing of a bankruptcy petition under Chapter 11, the debtor may retain control of his assets or the court may appoint a "trustee" to take control of those assets. 11 U.S.C. § 1104(a). The trustee, or the "debtor in possession" in the event no trustee is appointed (*see* 11 U.S.C. § 1107), has broad statutory authority to operate the debtor's business (*id.* § 1108); affirm, reject, or assign executory contracts (*id.* § 365); avoid voidable transfers of property (*id.* § 544); avoid certain statutory liens (*id.* § 545); avoid fraudulent conveyances (*id.* § 548); recover preferences (*id.* § 547); avoid certain postpetition transfers (*id.* § 549); recover certain offsets by creditors (*id.* § 553); and abandon property of the bankruptcy estate (*id.* § 554).

The focus of the Chapter 11 process is the reorganization plan. The plan specifies the treatment of the debtor's various obligations (*e.g.*, whether a particular debt will be paid in full or discharged in whole or in part) as well as the allocation of the debtor's assets. *See generally* 11 U.S.C. § 1123. The creditors have an important role in approving a plan. As a general matter, a plan that impairs the interests of a class of creditors may not be confirmed unless the plan is endorsed by that class of creditors. *See id.* § 1129.[15]

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[15] There are limited exceptions to this principle. *See* 11 U.S.C. § 1129.

In this case, both the debtors (who were debtors in possession because no statutory trustee was appointed by the bankruptcy court) and one of the creditors – The Bank of New York – proposed reorganization plans. Neither the debtors' plans nor the Bank's Plan made provision for the payment of taxes and neither disclosure statement (a document filed by the proponent of a plan that explains the terms of the plan (*see* 11 U.S.C. § 1125)) made provision for payment of taxes. App. 30a. The Bank's Plan "create[d] a trust and require[d] that a Liquidating Trustee be appointed whose responsibilities include the identification and payment of all valid claims against the estate with the payment of the sum remaining to the debtors." *Ibid.* The corpus of the trust was to be the assets of the debtors' bankruptcy estates.

As the bankruptcy court explained, "[t]he Liquidating Trustee's duties and powers under the plan are limited. The Liquidating Trustee does not possess discretionary authority as to the disposition of plan's assets. The Liquidating Trustee is merely charged with the responsibility of identifying, quantifying and paying allowed claims through the disbursement of trust assets in accordance with the terms of the confirmed plan." App. 32a-33a. The Plan specified the precise manner in which the trustee was to reduce the assets to cash and the order in which the claims were to be paid (the accompanying disclosure statement described the particular amounts of the claims in each category). *See* Bank App. B-52 to B-56 to this brief (excerpts from reorganization plan).[16] The court of appeals and the district court properly characterized the Liquidating Trustee's duties as "limited and essentially ministerial functions." App. 24a; *accord, id.* at 11a-12a.

Both the debtors' reorganization plans and the Bank's Plan – together with the accompanying disclosure statements – were served on the interested parties, including

[16] Amounts were not specified for claims still in litigation.

the Internal Revenue Service. The IRS did not object to either plan on the ground that it failed to provide for filing of returns and payment of taxes by the Liquidating Trustee. App. 18a-19a. (The debtors similiarly failed to press an objection. *See* p. 3, *supra*.) As the bankruptcy court observed, the IRS

> was involved in other tax disputes with the debtors and had notice of the bankruptcy proceedings. The government received copies of the competing plans and disclosure statements; had an opportunity to object and be heard on the terms proposed in the plans; and to appeal from the order of confirmation which contained no provision for payment of capital gains taxes. The government did none of these things.

App. 30a; *see also id.* at 18a-19a ("[t]he IRS filed no objections to either the disclosure statement or the plans").[17]

The IRS plainly could have raised the taxation issue prior to confirmation of the plan. It could have objected as a party in interest (*see* 11 U.S.C. § 1128(b)) or on the ground that the principal purpose of the plan was to avoid taxes (*id.* § 1129(d)). If the IRS had objected

[17] The IRS has a specific group of employees, the Special Procedures Function ("SPF"), whose job is to ensure that the IRS is protected in bankruptcy cases. The Internal Revenue Manual prescribes detailed guidelines that these employees are enjoined to follow in order to make certain that the IRS's interest in tax collection is protected under reorganization plans proposed in Chapter 11 cases. (Pertinent excerpts from the manual are attached as Appendix B-1 to B-32.) IRM 57(13) 5.3(4)(a) provides that "SPF should review the Plan to ensure that the government's claim is treated as required by the Bankruptcy Code," and that the SPF employee should refer the case to the Service's District Counsel if the plan "does not provide for all administrative taxes to be paid in full, in cash, upon the effective date of the Plan," or if the plan "appears, in any way, to jeopardize the government's interest."

at that time, the bankruptcy court – and the other creditors as well – would have been able to consider the issue prior to confirmation of the Plan and evaluate the impact of the IRS's contention on repayment of other creditors as well as the reorganized debtors' ability to pay any taxes that might be due.[18]

The Bank of New York plan eventually was confirmed by the creditors and the bankruptcy court. That determination was upheld by the district court, the Eleventh Circuit dismissed the debtors' appeal as moot, and this Court denied review. *Holywell Corp. v. Bank of New York*, 59 Bankr. 340 (S.D. Fla. 1986), *dismissed as moot*, 838 F.2d 1547 (11th Cir.), *cert. denied*, 488 U.S. 823 (1988). Pursuant to the terms of the Plan, the Liquidating Trustee has paid the claims of over 400 creditors, amounting to many millions of dollars. Several other claims remain unpaid. In addition, in reliance on the effectiveness of the

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[18] A recurring theme of the certiorari petitions is that the court of appeals' decision will burden the reorganized debtors with potential tax liability and therefore undercuts the "fresh start" policy embodied in the bankruptcy laws. To begin with, there is nothing unusual about a Chapter 11 Plan that imposes upon the reorganized business some continuing obligation to pay off creditors. 5 *Collier Bankruptcy Practice Guide* ¶90.06[4] (1991) (discussing deferred payments). This is especially true with respect to tax liabilities. *See* 11 U.S.C. § 523(a)(1) (continuing obligations of individual debtors after discharge). Second, as we have discussed (*see* pages 4-5, *supra*), there is absolutely nothing in the record that makes possible calculation of this supposed tax burden and it is possible that the actual liability will be negligible. Moreover, the reorganization plan contemplates that the debtors will receive assets from the Liquidating Trust and it is certainly possible that those assets will cover any tax liability that might be found to be due. Finally, the debtors' newly-found concern about potential tax burdens rings quite hollow in light of the fact that the debtors previously took the position that the Liquidating Trustee was *not* obligated to file returns and pay taxes. *See* page 4, *supra*.

Plan, the Bank has advanced $13.6 million to the Liquidating Trustee and released $30 million in cash collateral, to the detriment of the Bank and the benefit of other creditors.

The IRS and the debtors argued vigorously in the courts below that the reorganization plan itself requires the Liquidating Trustee to file the returns and pay any taxes that are due. Each of the lower courts squarely rejected that argument, holding that these claims are not within the scope of the Plan. App. 7a-10a, 21a-23a, 29a-30a. Petitioners do not seek review of that determination. As the case comes to this Court, therefore, it has been conclusively determined that the reorganization plan bars the Liquidating Trustee from filing the returns and paying the taxes.

Petitioners assert that, despite their failure to press this issue prior to confirmation of the Plan, despite the absence from the reorganization plan of any authority for filing of returns or payment of taxes, and despite the fact that – as a result of the effectiveness of the Plan – the bulk of the creditors have been paid and the Bank has advanced funds and released collateral, they may at this late date impose upon the Liquidating Trustee the obligation to pay certain taxes because federal statutes assertedly require the Liquidating Trustee to perform that function. That argument is inconsistent with fundamental bankruptcy principles.

Courts have repeatedly invoked the mootness doctrine in bankruptcy reorganization cases, dismissing actions as moot where granting the relief sought by the plaintiff (or appellant) would unfairly prejudice persons who relied in good faith on the prior approval of a reorganization plan (*In re National Homeowners Sales Service Corp.*, 554 F.2d 636 (4th Cir. 1977)), or would cast doubt on the validity of completed transactions and "create an unmanageable, uncontrollable situation for the Bankruptcy Court." *In re Roberts Farms, Inc.*, 652 F.2d 793, 797 (9th Cir. 1981). *See also In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.2d 1294 (11th Cir. 1984). In this very case, the Eleventh Circuit – in dismissing as moot challenges to the reorganization pian and other efforts to reopen issues

determined by the Plan – repeatedly has upheld the bankruptcy court's determination that "the plan had been substantially consummated and that its fairness, feasibility, and propriety had been verified, and that it had become legally and practically impossible to unwind the consummation of the plan or otherwise to restore the status quo before confirmation." *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547, 1557 (11th Cir. 1988), *cert. denied*, 488 U.S. 823 (1988). *See also* App. 7a, 20a-21a, 36a-37a; *In re Holywell Corp.*, 901 F.2d 931, 933-934 (11th Cir. 1990), *cert. denied*, 111 S.Ct. 713 (1991); *In re Holywell Corp.*, 874 F.2d 780, 782 (11th Cir. 1989), *cert. denied*, 110 S.Ct. 725 (1990).

We recognize that the foregoing cases do not involve obligations assertedly imposed directly by statute. We submit, however, that on the peculiar facts of this case, the same outcome is appropriate. The Bank and other creditors who remain unpaid relied upon the express terms of the reorganization plan in voting to confirm the plan and – in the case of the Bank – investing millions of dollars of new funds, releasing millions of dollars of collateral, and otherwise altering its financial position. It is simply too inequitable for the IRS and the debtors to try to effectuate what is in effect a change in the terms of the reorganization plan, especially in light of the numerous prior opportunities that these parties had to assert their current position. App. 36a ("[t]he payment of the federal taxes would, of necessity, be an impermissible modification of the confirmed plan"). Certainly in view of the unclear nature of any possible statutory obligation (as we discuss below, there is no precedent for the application of Section 6012(b) to a ministerial functionary like the Liquidating Trustee), the IRS and the debtors should not be permitted to retroactively amend the reorganization plan to the detriment of parties who relied on the terms of the Plan.

Moreover, as we now discuss, petitioners' interpretation of the law – rejected by all three of the courts below – is wrong. Indeed, as we demonstrate below (*see* pages 23-25, *infra*), no other court has imposed an obligation to file returns in circumstances like those presented in this case.

B. Section 6012 Does Not Require The Filing Of Returns By The Liquidating Trustee Because The Liquidating Trustee Is Not A Statutory Trustee And Because He Exercises Only "Essentially Ministerial" Powers.

Petitioners argue that federal law requires the Liquidating Trustee to file returns and pay federal taxes on behalf of the debtors. That interpretation of the relevant statutes is wrong.

Petitioners' argument rests principally on Section 6012(b)(3) of the Internal Revenue Code, 26 U.S.C. § 6012(b)(3), which states that where a "receiver, trustee in a case under title 11 of the United States Code, or assignee" has possession of or holds title to all or substantially all the property or business of a corporation, the "receiver, trustee or assignee" must make the income tax return for the corporation. The courts below correctly held that the Liquidating Trustee is not encompassed within the terms of this provision.

To begin with, the Liquidating Trustee is not a "trustee in a case under title 11 of the United States Code" because that phrase – which is a term of art in the bankruptcy context – refers only to the statutory trustees that may be appointed in cases under Chapters 7, 11, 12, and 13 of the Bankruptcy Code. As we have discussed (*see* page 11, *supra*), these trustees are endowed by statute with broad powers over the debtor's estate.[19]

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[19] Each chapter of the code tailors the statutory trustee's responsibilities to the ultimate purpose of the particular bankruptcy proceeding. *See, e.g.*, 11 U.S.C. §§ 704, 721 (discussing duties of trustee in Chapter 7 liquidation proceeding). The consistent theme, however, is the unique authority with which the statutory trustee is endowed.

The portions of the Bankruptcy Code describing the powers of these statutory trustees refer to them as "trustee[s] in a case under this title [title 11]." 11 U.S.C. § 321(a) (setting forth eligibility criteria for "trustee in a case under this title"); 11 U.S.C. §§ 322(a) & (b) (qualification requirement that must be met for a person "to serve as trustee in a case under this title"); 323(a) & (b) (providing that "[t]he trustee in a case under this title is the representative of the estate" and that "[t]he trustee in a case under this title has capacity to sue and be sued"); 324(b) (effect of court's removal of "a trustee . . . in a case under this title").

No one would contend that the latter provisions apply to non-statutory trustees who happen to be appointed when a trust is created in the context of a bankruptcy case. Such individuals are not "the representative of the estate" (11 U.S.C. § 323(a)); that role is fulfilled by either the statutory trustee or the debtor in possession. And the statutory selection and qualification criteria do not apply to non-statutory trustees. (Indeed, the criteria set out in Sections 321 and 322 were *not* applied to the Liquidating Trustee in this case.)

Congress's use of the same "trustee in a case under [title 11]" language in Section 6012(b)(3) cannot be dismissed as mere happenstance, especially given the close relationship between Section 6012(b) and the bankruptcy laws. The latter provision plainly was intended to encompass the same limited class as the portions of the Bankruptcy Code discussed above: statutory trustees appointed pursuant to the express provisions of the Bankruptcy Code relating to trustees. *See* App. 11a (distinguishing between trustees under Bankruptcy Code and a "contract trustee"); *accord, In re Sonner,* 53 Bankr. 859, 866 (Bankr. E.D. Va. 1985) (Liquidating Trustee not "trustee" within meaning of Section 6012(b)(3)). Significantly, petitioners have not pointed to a single case

addressing the meaning of "trustee" that reaches a different conclusion.

Similarly, the Liquidating Trustee is not a "receiver" or "assignee" within the meaning of Section 6012(b)(3) or a "fiduciary" within the meaning of Section 6012(b)(4).[20] As the court of appeals concluded, "the Liquidating Trustee's nondiscretionary duties of distributing the trust property in accordance with the Plan makes him similar to a disbursing agent rather than an assignee or fiduciary." App. 11a-12a; *accord, In re Alan Wood Steel Corp.*, 7 Bankr. 697, 700 (E.D. Pa. 1980) ("a disbursing agent is not a receiver, trustee or assignee of the debtor corporation").[21] Indeed, as we discuss below (at pages 23-25), the cases cited by petitioners demonstrate that Section 6012 has been applied only to individuals or entities exercising broad powers approaching those of statutory bankruptcy trustees.

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[20] Section 6012(b)(4), on which the IRS also relies, states that "[r]eturns of an estate, a trust, or an estate of an individual under chapter 7 or 11 of title 11 of the United States Code shall be made by the fiduciary thereof." The IRS contends that the Liquidating Trustee is a fiduciary of the individual debtor.

[21] The IRS tries to distinguish *Alan Wood* on the ground that the court stated that the disbursing agent did not "have possession of or hold title to all or substantially all the business or property of the debtor corporation." 7 Bankr. at 701. But the district court was speaking generically about the nature of the relationship between a disbursing agent and the assets he is charged with distributing. Because the disbursing agent's powers are limited, he cannot be said to either have possession of or hold title to the debtor's property. Indeed, the court had to be making that point because the disbursing agent was in fact in the same position as the Liquidating Trustee here: the debtor's funds were held by the disbursing agent. *See id.* at 699, 701. Thus, *Alan Wood* – the only other case we have located addressing the status under Section 6012 of persons exercising only ministerial authority – reached precisely the same result as the courts below.

The distinction drawn by Congress in excluding trustees who exercise ministerial powers from the reach of Section 6012(b) is entirely rational. To the extent an individual's duties are wholly ministerial and he lacks the discretion to alter prearranged transactions or a prearranged schedule of disbursements, it would be unfair to impose upon that individual the duty to file returns and pay taxes. He would be put to the choice of violating his trust obligation or violating the law. As this Court has indicated in a related context, it would be improper to impose tax obligations on persons unable to exercise control over the allocation of the debtor's assets among creditors. *King v. United States*, 379 U.S. 329, 337-339 (1964); *see also id.* at 433 (White, J., concurring).[22]

As a practical matter, moreover, entities with only limited discretion, like the Liquidating Trustee, do not have access to the records needed to prepare tax returns. Receivers with wide-ranging powers, such as those with

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[22] The question in *King* was whether a disbursing agent was personally liable under a predecessor of 31 U.S.C. § 3713(b) for paying another claim prior to a priority claim of the government. The Court recognized that "[w]hether or not [the defendant] falls within the category of fiduciaries on whom such responsibility should be placed depends . . . upon the degree of control he is in a position to assert over the allocation among creditors of the debtor's assets in his possession." 379 U.S. at 337. The Court held that the disbursing agent was subject to the tax obligation because the particular facts of that case indicated that the disbursing agent, who was the former president of the debtor corporation, had "a sufficient degree of control over the allocation among creditors of assets in his possession to give rise to responsibility . . . for seeing that the government priority was paid." *Id.* at 339. *See In re Childress*, 59 Bankr. 828, 832 (Bankr. N.D. Ill.), *aff'd*, 68 Bankr. 742 (N.D. Ill. 1986), *aff'd*, 851 F.2d 926 (7th Cir. 1988) (refusing to hold disbursing agent liable in absence of special facts present in *King*).

authority to wind up the affairs of an entire corporation, are more likely to possess the necessary information. Here, for example, the discharged debtors retained the relevant records and represented that they would file the tax returns. *See* Bank App. B-33-B-38. Even though they have changed their position regarding the filing of returns, the debtors have *refused* to provide the records to the Liquidating Trustee, going so far as to stand in contempt rather than divulge the information. This further supports the conclusion that tax obligations should not be held to extend to an individual or entity with the limited authority of the Liquidating Trustee.[23]

Significantly, the dissenting judge below recognized that the degree of discretion exercised by the Liquidating Trustee is important in determining whether he fits within these provisions. The dissent's contrary view of the proper resolution of this case rested entirely on the conclusion that this particular Liquidating Trustee exercises "broad powers" and therefore cannot be characterized as a disbursing agent. App. 14a-15a. There is no basis for rejecting the well-supported contrary view of the court of appeals (*id.* at 11a-12a), district court (*id.* at 23a-24a), and bankruptcy court (*id.* at 32a-33a) on this fact-bound question.

Those courts properly looked to what the Liquidating Trustee actually was called upon to do by the provisions of the Plan rather than the boilerplate language relating to the trustee's powers to transfer property. The Plan by its express terms eliminates *all* discretion with respect to the trustee's disposition of assets and *all* discretion with

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[23] Finally, as the District Court (App. 24a-25a) and the Bankruptcy Court (*id.* at 33a-34a) concluded, the Liquidating Trustee is not liable for taxes under the provisions of the Internal Revenue Code concerning grantor trusts. The Liquidating Trust is a grantor trust under applicable regulations (*see* Treas. Reg. § 1.671-1 and § 1.677(a)-1(d)) and the debtors are therefore responsible for reporting and paying any applicable taxes. *See In re Sonner, supra.*

respect to the trustee's disbursement of the proceeds to creditors. *See* Bank App. B-52 to B-56. Every step that the trustee may take is carefully specified in the Plan itself. Moreover, the facts before the lower courts showed that the Liquidating Trustee has never once exercised discretion in administering the trust. The three courts below correctly concluded that this particular Liquidating Trustee's "essentially ministerial" authority renders Section 6012 inapplicable here.[24]

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[24] The debtors invoke two other statutes, but – not surprisingly given their irrelevance in this case – the IRS does not rely on these statutes and the court of appeals found it unnecessary to respond to the debtors' arguments. It is worth noting, in addition, that even the debtors do not argue that there is a conflict among the lower courts with respect to the meaning of these provisions.

The first provision, 31 U.S.C. § 3713(a), concerning the priority to be accorded government claims, does not by its terms apply to bankruptcy cases and, accordingly, is inapplicable here. *See id.* § 3713(a)(2) ("[t]his subsection does not apply to a case under title 11"). Contrary to the debtors' claim (Pet. 20-21) this creates no anomaly. The Liquidating Trustee is not a "trustee in a case under [title 11]" because that term is limited to statutory trustees. The fact that the reorganization plan is the product of a "case under title 11" in no way undercuts that conclusion. And that result makes perfect sense. The government's priority applies in all contexts other than bankruptcy cases. In the bankruptcy context, the government must press its claims before the bankruptcy court pursuant to applicable bankruptcy principles. The government cannot override the outcome of the bankruptcy proceeding by invoking the priority statute. (*King v. United States, supra*, on which the debtors rely, interpreted a prior version of this provision that did not have the exception for bankruptcy cases.)

Section 3713(b), imposing personal liability for failure to pay claims pursuant to Section 3713(a) is inapplicable because there is no Section 3713(a) claim here. In addition, that provision does not apply to disbursing agents exercising only ministerial authority. *See* page 20 & n.22, *supra*.

(Continued on following page)

C. The Decision Below Does Not Conflict With Any Decision Of This Court Or Another Court Of Appeals.

Petitioners argue that the decision below conflicts with numerous decisions of other courts. Of course, this claim of universal conflict is unlikely on its face. And in fact, many of the cases cited by petitioners are irrelevant here because they involve the obligations of statutory bankruptcy trustees. *See Nicholas v. United States*, 384 U.S. 678, 692 (1966); *In re Bentley*, 916 F.2d 431 (8th Cir. 1990); *In re Joplin*, 882 F.2d at 1510; *In re Sapphire S.S. Lines*, 762 F.2d 13 (2d Cir. 1985); *In re I.J. Knight Realty Corp.*, 501 F.2d 62, 63 (3d Cir. 1974); *United States v. Sampsell*, 266 F.2d 631 (9th Cir. 1959). As we have discussed, Section 6012(b) expressly imposes the tax-filing obligation on such trustees but the Liquidating Trustee plainly does not fall within that category.

(Continued from previous page)

The debtors also invoke 28 U.S.C. § 960, but the purpose of that provision is to ensure that persons operating pursuant to judicial decree are not deemed immune from otherwise-applicable tax statutes. *California State Board v. Sierra Summit, Inc.*, 109 S. Ct. 2228, 2234-2235 (1989) (observing that the statute was passed "at the height of the intergovernmental tax immunity doctrine, in response to a Federal District Court decision holding that a bankruptcy receiver" was not subject to state taxation; "[r]ead most naturally, the statute evinces an intention that a State be permitted to tax a bankruptcy estate notwithstanding any intergovernmental immunity objection that might be interposed"); *In re I.J. Knight Realty Corp.*, 501 F.2d 62, 66 (3d Cir. 1974) (Section 960 "was not intended to establish or limit substantive [federal] income tax liability" but only to negate any inference of "an immunity from federal taxation"); *In re New York, N.H. & H.R. Co.*, 360 F. Supp. 1155 (D. Conn. 1973). Petitioners still must establish that some *other* statute imposes tax responsibility on the Liquidating Trustee. That is what they have failed to do.

Other cases cited by petitioners involve individuals or entities who exercised broad authority over the disposition of the corporation's assets – either by virtue of their status as statutory receivers under state or federal law or as the result of a contract – because the corporation itself had been dissolved or was otherwise wholly defunct. *Hersloff v. United States*, 310 F.2d 947 (Ct. Cl. 1962); *United States v. Loo*, 248 F.2d 765 (9th Cir. 1957); *Pinkerton v. United States*, 170 F.2d 846 (7th Cir. 1948); *Kavanagh v. First National Bank of Wyandotte*, 139 F.2d 309 (6th Cir. 1943); *Louisville Property Co. v. Commissioner*, 140 F.2d 547 (6th Cir.), *cert. denied*, 322 U.S. 754 & 755 (1944); *First National Bank v. United States*, 86 F.2d 938 (10th Cir. 1936); *Tazewell Elec. Light & Power Co. v. Strother*, 84 F.2d 327 (4th Cir. 1936); *Whitney Realty Co. v. Commissioner*, 80 F.2d 429 (6th Cir. 1935); *Northwest Utilities Securities Corp. v. Helvering*, 67 F.2d 619 (8th Cir. 1933); *Hellebush v. Commissioner*, 65 F.2d 902 (6th Cir. 1933). But the courts in the present case based their determination on the fact that the Liquidating Trustee does *not* exercise plenary authority of the type exercised by the receivers and trustees in each of the supposedly conflicting cases. (He could not exercise such authority because, in sharp contrast to petitioners' cases, the debtors here are neither dissolved or defunct, but rather have emerged from bankruptcy as reorganized entities.) Because the very characteristic held to be dispositive in the present case was absent in these other cases, they cannot be said to conflict with the decision below. The decisions cited by petitioners shed no light whatsoever on the result that would obtain if those courts were confronted with the quite different factual circumstances presented here.

Indeed, precedent within the Eleventh Circuit itself recognizes that receivers or trustees with wide-ranging discretion are subject to tax obligations. One of the allegedly conflicting cases relied upon by the debtors (Pet. 24 n.30) is *Taylor Oil & Gas Co. v. Commissioner*, 47 F.2d 108 (5th Cir.), *cert. denied*, 283 U.S. 862 (1931), a

decision that constitutes binding circuit precedent within the Eleventh Circuit (*see Bonner v. City of Pritchard*, 661 F.2d 1206, 1209-1211 (11th Cir. 1981)). *Taylor Oil* differs from the present case because of the grant to the Liquidating Trustees of "full power to settle [the corporation's] affairs, collect the outstanding debts, and divide the moneys and other property of the corporation among the stockholders, after paying all the debts due and owing." 47 F.2d at 108.[25] *Taylor* thus indicates that there is no conflict between the Eleventh Circuit rule and that of the other circuits: all agree that statutory bankruptcy trustees and individuals or entities exercising broad discretion over the debtor's assets are subject to tax obligations.

The debtors filed a suggestion for rehearing en banc in the court of appeals relying on the alleged conflict between *Taylor* and the present case. Not one judge, including the dissenting judge below, requested a vote on the suggestion. The Eleventh Circuit plainly recognized that it was applying a different rule based on the significantly different facts of the present case.

The only question presented by this case is whether tax obligations may be imposed on a Liquidating Trustee who exercised solely ministerial authority. The courts below resolved this question of first impression by concluding that they may not. No court of appeals has reached a different determination. The absence of any conflicting authority weighs strongly against further review.

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[25] The specific issue presented in *Taylor Oil* was whether the trustees were paying the relevant taxes on their own behalf or on behalf of the company. The court's conclusion was that the trustees were obligated to pay taxes on behalf of the company, the precise result that petitioners contend for here.

D. The Question Presented Does Not Warrant Review By This Court.

The foregoing discussion establishes that review by this Court is not warranted in this case. First, the dire practical implications hypothesized by petitioners are entirely speculative. There is no evidence at all that the use of Liquidating Trustees endowed with only ministerial authority is growing or that such trusts are being used as a device to avoid payment of taxes. Petitioners' failure to point to any reported case in the *three years* since the bankruptcy court's decision certainly undercuts petitioners' argument that the issue warrants this Court's immediate attention. Moreover, the IRS retains complete authority to protect the public fisc through its participation in the approval of reorganization plans. There is no danger that substantial tax revenues could be lost unless – as here – the government simply fails to utilize its authority to participate in bankruptcy cases.[26]

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[26] The government may argue that it will bear too great a burden if it is required to participate in every Chapter 11 case in order to protect its right to recover taxes. But, as the IRS's own manual recognizes, the government already participates in these cases to maximize recovery of pre-confirmation tax liability, which may be discharged pursuant to a reorganization plan. *See, e.g., In re International Horizons, Inc.*, 751 F.2d 1213 (11th Cir. 1985) (holding that tax liability claim was barred because IRS failed to assert claim prior to the bar date); *In re St. Louis Freight Lines, Inc.*, 45 Bankr. 546 (Bankr. E.D. Mich. 1984). Indeed, some of the potential tax liability that is the subject of this action – any gain from the sale of the "Washington Properties" – is pre-confirmation liability.

There is no danger that the government will not learn of a pending reorganization proceeding. The IRS typically is a party to bankruptcy proceedings as a creditor. Moreover, the Bankruptcy Rules specifically provide that in a Chapter 11 case, the Service must receive copies of all notices required to be mailed to all creditors. Rule 2002(j)(3). There accordingly can be no doubt that the government has ample ability to protect its interest.

Second, petitioners' arguments on the merits reduce to a fact-bound dispute over the amount of discretion granted to this particular Liquidating Trustee in this particular case. Petitioners cannot point to a single case in which the degree of discretion was held irrelevant or a single case in which Section 6012(b) was held to apply to an individual or entity with the limited discretion of the Liquidating Trustee here.

Third, what this case really amounts to is an effort by the debtors and the IRS to use this collateral proceeding to subject the Liquidating Trustee to obligations that the debtors and the IRS failed to press in the context of the reorganization proceeding. Here, of course, there is no way for other parties, who already have changed position in reliance on the confirmed reorganization plan, to protect their interests. In view of the narrow compass of the question presented and the absence of any conflict among the courts of appeals, there is no reason to give petitioners this second bite at the apple at the expense of other parties who relied on the outcome of the bankruptcy proceeding. The petitions for a writ of certiorari should be denied.

CONCLUSION

The IRS has not been excused by law from complying with the Bankruptcy Code and with orders of the bankruptcy court. The facts of this case are unique and fully support the result. Three courts below reached the same result. The facts and the result do not conflict with any decision by this Court or by any of the courts of appeals.

It is respectfully submitted that the petitions should be denied.

Respectfully submitted,

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57(13)1.226 [Excerpts from the Internal Revenue Manual] Chapter 11, Reorganization

(1) Any person (individuals, partnerships and public and private corporations) who can be a debtor in a Chapter 7 case may also be a debtor under Chapter 11. A railroad may also be a debtor in a Chapter 11 proceeding. Excepted are stock brokers and commodity brokers (section 109(d)). Cases under Chapter 11 may be voluntary (petitioned by debtor) or involuntary (petitioned by creditors) and are commenced by filing a petition with the bankruptcy court. The filing of a voluntary petition constitutes an automatic order for relief. Approval of the court is not necessary (section 301). A husband and wife may file a joint petition and the court will determine to what extent, if any, their estates should be consolidated (section 302).

(a) Upon filing of the petition, the court can, for cause, if requested by a party in interest, order the appointment of a trustee to operate the business (section 1104(a)). But if a trustee is not appointed, the debtor may continue, as debtor-in-possession, to operate the business.

(b) After the order for relief has been issued, the court shall appoint a committee of unsecured creditors, ordinarily consisting of persons (which does not include governmental units) willing to serve, who hold the seven largest claims (section 1102(a)(1) and (b)(1)). The committee shall consult with the trustee or debtor-in-possession, investigate the debtor's acts, financial condition, operation of the business, etc. It shall participate in the formulation of a plan, advise those it represents of its

recommendations as to the plan and solicit and file acceptances (section 1103(c)).

(2) Sections 1121 through 1129 deal with the requirements of a Chapter 11 plan and the confirmation process.

(a) The holder of a claim may accept or reject the plan. The Secretary of the Treasury may accept or reject a plan on behalf of the United States, when the U.S. is a creditor (section 1126(a)).

(b) Acceptance of a plan is not necessary, nor will it necessarily be solicited by the debtor, if the claim holder is not impaired (section 1126(f)). Impairment is defined at section 1124.

(c) Administrative tax claims and "gap" period expenses in an involuntary case must be paid in full, in cash, upon confirmation unless the Government agrees otherwise (section 1129(a)(9)(A)). Unsecured prepetition priority taxes must be paid in cash, but may be paid over a period not exceeding six years after the taxes are assessed. The payments must be of a value as of the date of the plan that equals the allowed amount of the claim; that is, interest must be included in determining the value of the claim.

(d) With respect to a lien claimant, the plan must provide, absent full payment upon confirmation or any agreement between the parties, that the holder of the claim either retains the lien securing the claim; obtains a lien on the proceeds of any sale of the secured property; benefits from any method which guarantees that the lienholder will receive the "indubitable equivalent," e.g.,

realty or personalty, of the allowed amount of the secured claim; or receives deferred cash payments totalling the allowed amount of the claim of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property (section 1129(b)(2)(A)).

(e) With respect to unsecured non-priority claims, a plan must provide, absent an agreement between the parties, that the claim holder receives, at a minimum, either deferred cash payments or property of a value, as of the effective date of the plan, of the greater of the allowed amount of the claim (section 1129(b)(2)) or the amount that would have been received in a liquidating proceeding (section 1129(b)(2)(B)).

(f) Basically, it must be shown that the plan is "fair and equitable." (section 1129(b)(2)). This typically means that, in the absence of a class of creditors having accepted the plan, any proposal must insure that each claim holder receives property (cash, real estate or personal property) of a value, as of the effective date of the plan, that is not less than the amount the claim holder would have received under a Chapter 7 liquidation (section 1129(a)(7)).

(g) Once the plan is accepted by creditors that hold at least two-thirds in amount and more than half in number of the allowed claims of a class, and the plan has met all other requirements of section 1126, the court shall hold a hearing on confirmation of the plan (section 1128). The plan will be confirmed if all of the requirements of section 1129 are met. The confirmation, in general, discharges partnerships and corporate debtors from all debts

that arose before confirmation (section 1141(d)(1)), including priority and general tax claims, but individual debtors remain liable for all non-dischargeable debts (1141(d)(2)). Priority taxes, under section 507(a)(7) and other tax exceptions to discharge in section 523 (See IRM 57(13)1.23(13)) are not dischargeable for individuals.

(h) A proof of claim is deemed filed for any claim scheduled in the petition, unless such claim is scheduled as disputed, contingent or unliquidated (section 1111(a)). However, the position of the Service is that a proof of claim will be filed in *all Chapter 11 cases*, to properly protect the Government's interest against erroneous information in a debtor's schedules.

* * *

57(13)2.42
Time for Filing (Bar Dates)

(1) The Bankruptcy Rules effective August 1, 1983 prescribe the time limits for filing proofs of claim.

(2) Rule 3002(c) provides that, in Chapter 7 and Chapter 13 cases, proofs of claim must be filed within 90 days of the first date set for the first meeting of creditors. However, see IRM 57(13)7.1 regarding postconfirmation claims in Chapter 13 cases.

(3) Rule 3003(c)(3) provides that in Chapter 11 cases the court will set and may, for cause, extend the time limit for filing a proof of claim. Rule 2002(a) provides for twenty day notice to creditors of this bar date.

(4) Recommended interim rules on Chapter 12 cases set a Chapter 12 bar date the same as a Chapter 13 under

Rule 3002(c) i.e. 90 days from the first date set for the meeting of creditors. These interim rules have been recommended to the local courts for adoption as local rules of court until formal rules are instituted.

(5) A creditor must generally file a timely proof of claim to share in the distribution of the proceeds of the estate unless the debtor, trustee or a co-debtor files a proof of claim on behalf of the creditor. In Chapter 11 cases only, it is not necessary to file a proof of claim if the debt is scheduled as liquidated, undisputed and not contingent.

(6) If the debtor schedules the tax liability or if one of the parties named above files a proof of claim on behalf of the Service, it is the Service's policy to file a proof of claim in any case to accurately set forth the amount due the Government.

(7) If no proof of claim was filed prior to the bar date SPf should determine whether a late proof of claim is warranted based on the amount of the liability and the likelihood of collection through the proceedings. A late proof of claim should not generally be filed unless the amount collectible in the proceedings exceeds the amount stated in 7(13)2.3:(1) of LEM V. If a proof of claim is warranted based on these factors, SPf should further consider the necessity for a proof of claim based on the likely duration of the proceedings and the prospects of postbankruptcy collection. If, after considering these factors a proof of claim appears to be warranted, SPf should promptly seek district counsel's opinion.

57(13)2.43
Preparation

57(13)2.431
Form 6338 Proof of Claim

(1) SPf, in the district where the proceeding is pending, or where there are outstanding liabilities, will prepare the appropriate proof of claim from the information secured from Form 2552, IDRS research and from the TDA Register, and Currently Not Collectible Accounts Register. SPf must file the proof of claim for the current balance due before the bar date, or any extension thereof, even though a petition to the United States Tax Court, an offer in compromise, adjustment, or any other action is pending which may thereafter give rise to a need for amendment of the claim filed.

(2) SPf will prepare Form 6338 in accordance with Exhibit 5700-62. The case files must be sufficiently well documented to clearly establish the basis for the proof of claim entries. A worksheet designed to show the adjustments made to IDRS or MRS transcript data to arrive at the proof of claim entries may be used for this purpose. This worksheet can be used by supervisory or advisory personnel who review and sign the proof of claim.

(3) When SPf prepares a proof of claim, it will make a determination as to the category of each liability listed on the claim, e.g., secured claim, unsecured priority claim or unsecured general claim. See IRM 57(13)2.47 and Exhibits 5700-66 and 5700-67.

(4) All tax liabilities accrued as of the petition date must be included on Form 6338. For these purposes, the entire income tax liability accrues at the close of the

taxable year. Periods (other than income tax) beginning before and ending after the petition date may have to be split between prepetition and post-petition claims. SPf should secure a copy of the return to allocate liabilities and payments to the prepetition and administrative claims. Because of the higher priority of administrative claims, the period should be split if the administrative portion of the liability will exceed the amount specified in 7(13)2.3:(1) of LEM V. If it is apparent from a review of the transcript that the administrative portion will not exceed this amount, the entire liability for the period may be claimed as prepetition.

(5) A copy of the earliest Notice of Federal Tax Lien which establishes the Government's priority for each liability listed as a secured claim on Form 6338 should be attached to the proof of claim. Subsequent filings of the same notices in other jurisdictions need not be attached. Districts with automated lien indexes that do not retain the recording officials' acknowledged copy of notices of Federal Tax Lien should attach a generated copy of the Notice of Federal Tax Lien.

(6) Section 506 (a) states that an allowed claim of a creditor that is subject to setoff under section 553 is a secured claim to the extent of the amount subject to setoff, and is an unsecured claim to the extent that the amount so subject to setoff is less than the amount of such allowed claim. Consequently, the amount to be setoff should be shown under item A. Secured Claims, on Form 6338 and noted with an asterisk. The following statement should also be shown:

"The Internal Revenue Service has the right to setoff this amount, which represents all (a portion) of the debtor's (debtors') (type of tax) refund for (period). Therefore the amount claimed in this proof of claim is secured under 11 U.S.C. 506(a) to the extent of the right of setoff, which is currently stayed under 362(a)(7)."

(a) The amount of the credit balance should be shown in item 7 of Form 6338.

(b) Often, the amount held for setoff is less than the total tax liability. In such a case, the excess over the amount shown as a secured claim should be shown in item B, Unsecured Priority Claims, or in item C, Unsecured General Claims, as appropriate.

(7) Priority taxes payable as other than seventh priority (see Exhibits 5700-66 and 5700-67) should be set out separately on Form 6338. SPf should include a statement explaining the priority claimed and the B/C section relied on.

(8) Pre-petition interest and prepetition penalties are allowable on all categories of claim. SPf should take the following steps to determine the correct amount of claimable penalties and interest.

(a) Secure an INTST printout to the petition date if it is available. This will furnish correct interest and failure to pay penalty for the proof of claim.

(b) If an INTST printout cannot be obtained, use command codes COMPA and COMPAF to secure interest and failure to pay penalty respectively.

(c) Compare the due date of the return to the petition date to determine the correct amount of claimable failure to file penalty. If penalty attributable to months after the petition is included in the assessment (e.g. 20% failure to file penalty is assessed and the petition date is less than three months and one day after the return due date), the penalty must be recomputed for proof of claim purposes.

(d) Postpetition interest is allowable on 'oversecured' claims. B/C section 506(b). If the claim is secured by a filed Notice of Federal Tax Lien it will not be immediately known whether the claim is 'oversecured'. Because the government's lien claims are rarely 'oversecured,' SPf should compute interest to the petition date. However, if the claim is secured by a credit balance in excess of the liability, postpetition interest is allowable to the extent of the excess. SPf should compute and claim interest to date and enter a statement on the proof of claim that interest will continue to accrue at the rate established under IRC 6621(b) until the account is satisfied.

(e) Compute and claim all prepetition penalties and interest for filed returns that are not yet assessed, whether the assessment is pending or prohibited by Section 362(a). SPf need not compute and claim penalties and interest for estimated liabilities. Periods for which returns were prepared under authority of IRC 6020(b) should be considered estimated liabilities only if the thirty day appeal period has not yet expired.

(f) See Exhibit 5700-112 for a chart describing the proof of claim treatment of penalties and interest in various circumstances.

(g) Penalties on priority and general unsecured claims need not be claimed unless there is good reason to expect they will be paid in the proceeding.

(9) The Bankruptcy Code requires disallowance of any claim which results from a credit reduction attributable to late payments to the state, in the amount of an otherwise applicable credit to the debtor in connection with F.U.T.A. payments. Therefore, the Government's claim will be disallowed the same as if a credit had been allowed in full on the Federal return, Form 940 (section 502(b)(8)). Also, in the case of wages paid by the trustee, IRC 3302(a)(5) provides that if the failure to pay contributions timely was without fault by the trustee, there will be no credit reduction.

(10) Since some taxpayers are engaged in multiple enterprises, and different entities sometimes have almost identical names, the outstanding assessments listed on the proof of claim should be carefully checked so that there will be included only those assessments outstanding against the particular taxpayer entity involved in the proceeding. When related taxpayer entities are involved in separate proceedings, a separate proof of claim is required for each taxpayer entity. If a corporation is involved, the claim should include corporate taxes only.

(11) When a partnership and some or all of the individual partners are involved in insolvency proceedings, care should be taken that the taxes claimed are clearly identified so that there will be no question as to which are *partnership* and which are *individual* liabilities. A proof of claim covering taxes for which the partnership

as such may be liable should be filed both in the partnership proceeding and in the proceeding involving the individual partners. Proofs of claim covering taxes of the individual partners should be filed in both the individual and the partnership proceedings. *See Legal Reference Guide for Revenue Officers.*

(12) If criminal prosecution of the taxpayer is under consideration, it may be advisable to vary this procedure. In such instance, SPf should consult district counsel. A review of the case will be made with either the Criminal Investigation function or district counsel. Cases in which the Criminal Investigation function has recommended withholding collection will be referred to district counsel for review.

57(13)2.432
Form 6338A, Request for Payment
of Internal Revenue Taxes

(1) SPf may use Form 6338A to claim administrative and 'involuntary gap period' taxes that are not paid in full on demand. SPf should prepare it as shown in Exhibit 5700-63.

(2) In general interest and penalties on administrative liabilities are claimable in full. There are two exceptions:

(a) IRC 6658 provides that the failure to pay penalty, the failure to pay estimated individual income tax penalty and the failure to pay estimated corporate income tax penalty will not be charged during bankruptcy if the failure to pay was pursuant to a court

finding of probable lack of funds. This relief does not apply to withheld or collected taxes.

(b) If a case is converted to another chapter and the administrative tax liabilities of the prior proceeding remain unpaid, interest and failure to pay penalty are allowable only to the date of conversion.

(3) The order of payment of the expenses of administration is not set out in the Bankruptcy Code and Federal taxes falling within that classification generally are paid on an equal priority with the other items of administration expense. In a converted case, administrative claims of the superseded Chapter 11, Chapter 12 or Chapter 13 proceeding are junior to the administrative expenses of the Chapter 7 estate. B/C Section 726(b).

57(13)2.44
Service of Proof of Claim

(1) SPf should send Parts 1 and 2 of the proof of claim to the proper official of the court by regular mail, or delivered by Collection personnel. The court official should be requested to acknowledge the receipt of the proof of claim by stamp or endorsement on Part 2 and to show thereon the time and place of filing. The receipted Part 2 should be returned to the SPf where it will be retained as evidence of filing in the event this act is later contested. SPf should send Part 3 by regular mail delivery to the fiduciary and note the case file as to the date of service.

(2) If the proof of claim is sent by mail to the proper official of the court or the fiduciary, Letter 981(DO)

should be used to transmit the claim if the court or the fiduciary requires a cover letter. See Exhibit 5700-64.

(3) If there is reason to believe that the timeliness of the filing of the claim may become an issue, or if it is desirable to establish evidentiary proof of its receipt by the proper party, the proof of claim may be delivered personally or sent by certified mail, return receipt requested.

(4) Part 4 of the proof of claim will be furnished to the United States Attorney upon return to the SPf of Part 2, properly acknowledging receipt of Part 1 by the court or fiduciary. SPf should forward the initial proof of claim filed in a proceeding to the United States Attorney. In some districts, the U.S. Attorney's Office prefers not to receive a copy of proofs of claim and has so advised the District Director's Office. In those districts, SPf should retain Part 4 with the case folder.

(5) SPf should forward Part 4 of any amended, supplemental, or consolidated proof of claim to the United States Attorney if the initial proof of claim was furnished to that office.

(6) If the acknowledged copy of a proof of claim is not received from the fiduciary or court within a reasonable time after the claim was forwarded, the SPf should initiate action to secure the acknowledged copy of the proof of claim. Actions might include a phone call or letter to the fiduciary or court official *(see Letter 985(DO) Exhibit 5700-65)*, a field visit by SPf personnel or the initiation of a Form 2209 to either secure the acknowledged copy of the proof of claim or to file a duplicated

copy of the proof of claim with the fiduciary or the clerk of court (as applicable).

57(13)2.45
Disputed Tax Claims

(1) When the validity or priority of the Federal tax claim is disputed in any proceeding, close cooperation of SPf with district counsel and the United States Attorney is imperative. It is essential that SPf quickly handle requests for information coming from either official so the interests of the Government are protected.

(2) Upon filing of a proof of claim in a proceeding, the Government becomes a party thereto, and officers and employees of the Service may appear as witnesses for the Government or may produce evidence in court in connection with the establishment of the validity of the proof of claim. For this appearance and for the production of evidence of this nature, no express authority need be obtained from the Commissioner so long as the appearance made or the evidence produced is intended to establish the rights of the Government.

57(13)2.46
Unliquidated, Amended, and
Supplemental Proof of Claim

57(13)2.461
General

When more time is needed within which to complete the examination of returns or the searches requisite to filing an accurate proof of claim, SPf may ask district counsel to take proper action to secure an extension of the

period for filing a claim. Alternatively, an unliquidated proof of claim may be filed. The request, if made, must allow sufficient time to permit filing of a motion for extension prior to the bar date provided by Rule 3002(c) or (in Chapter 11) set by the court under Rule 3003(c)(3). Since the application for extension must indicate the reason why the additional period is necessary for the filing of the claim, district counsel should be furnished such information at the time the request for extension is made. SPf should be prepared to file a timely unliquidated proof of claim if the extension is denied.

57(13)2.462
Unliquidated Claims

(1) An unliquidated proof of claim is the type of claim filed to protect the Government's interest before the exact liability of the taxpayer is determined. The unliquidated claim generally serves to meet the bar date limitation and must be followed by an amended or a supplemental proof of claim setting forth the correct tax liability after the exact amount owing has been determined.

(2) Proofs of claim (either Form 6338 or 6338-A) should include both liquidated and unliquidated amounts, with the latter being identified as "Unliquidated liability" in the "Remarks" columns. When estimating the amount of tax claimed, rounded figures should be avoided, in every instance the class of tax and the taxable periods with respect to each should be shown separately with the estimated amount for each class of tax and taxable period for which any possible claim may be made in the final amended claim.

(3) SPf should base the estimated tax liability upon the information furnished in any status report. As soon as the correct and complete amount due can be determined, the estimated claim will be superseded by filing an amended proof of claim.

57(13)2.54
General Monitoring and Case Review Procedures

(1) Copies of court papers should be examined as soon as they are received, since in many cases they announce hearings for which the Government will have little time to prepare. These hearings may involve proposed orders which affect the Government's rights. (Sometimes orders affecting the Government's rights are entered without advance notice.)

(2) Schedules attached to the petitions should be examined both to ensure that they include all the taxes due the Government and to determine the taxpayer's financial condition.

(3) Petitions for payment of interim fees and allowances, for leave to sell, abandon, or otherwise dispose of assets, etc., should be considered to determine whether the Government should object.

(4) SPf should be especially vigilant for excessive administrative costs and attorneys' fees.

(5) SPf should also –

(a) *ensure* that all proofs of claim are filed *timely*;

(b) notify fiduciaries of their filing requirements, and, when appropriate, of their responsibilities under Title 31, United States Code, Sections 3713(a) and (b);

(c) ensure that the required account for trust fund taxes is established, that deposits are sufficient and timely, and that all related protective provisions are complied with;

(d) negotiate, when necessary, with fiduciaries concerning deposits and payments;

(e) notify the appropriate district director, as soon as possible, after learning that a pending proceeding involves a debtor from whom another district has responsibility for collecting Federal taxes;

(f) contact the SPf of the other district to coordinate collection action in any case involving a taxpayer who owes Federal taxes in the one district and is the subject of a bankruptcy proceeding pending in another district;

(g) adjust a tax liability because the claim is determined to be excessive or erroneous (if no formal objections have been filed in the proceeding) without reference to district counsel.

(6) for more specific reviews which must be made by SP function, refer to the following (non-inclusive):

(a) For Periodic Case File Review, see IRM 57(13)2.55.

(b) For Review of Collection Statutes, see IRM 57(13)3.17.

(c) For Chapter 11 Case Reviews, see IRM 57(13)5.

(d) For Chapter 12 Case Reviews, see IRM 57(13)6.

(e) For Chapter 13 Case Reviews, see IRM 57(13)7.

57(13)2.55
Periodic Case File Review

SPf should review the proof of claim files periodically to determine the status of the proceeding and the prospects of collection based on the proof of claim filed. Care should be taken in scheduling to minimize unnecessary reviews. For example, schedule the first post-proof of claim review of Chapter 7 bankruptcies later than the date distribution is expected based on SPf's experience. SPF may determine the status of the proceeding by requesting data from the fiduciary on a Letter 984 (DO) (*see Exhibit 5700-74*); through a field investigation by SPf or CFf personnel, or by telephoning the fiduciary and/or the attorney for the estate and making the case history accordingly.

57(13)5
Special Processing in Chapter 11 Cases

57(13)5.1
Initial Processing

(1) Bankruptcy Rule 2002(j) provides that the clerk will mail a copy of all notices to creditors in Chapter 11 proceedings to the District Director of Internal Revenue. SPf should contact the court, through district counsel, if necessary, if Chapter 11 required notices are not received or not received timely.

(2) On receipt of the notice, SPf should record the case in the bankruptcy control log and forward Form 2552 to SCCB or CSf for research and TC 520 input unless this work is done in SPf. See IRM 57(13)2.3. SPf should send Letter 986 (DO), Exhibit 5700-70 at this time unless the court issues orders or instruction sheets concerning the debtor's post petition employment tax responsibilities.

(3) Where SPf and district counsel have agreed that early bankruptcy court action is necessary in high risk cases to prevent postpetition noncompliance. SPf should conduct local research in Chapter 11 cases. IDRS or MRS research should be done to the extent necessary to identify the cases that qualify for referral to counsel. Criteria for these preventive referrals should normally include high prepetition liability and high current payroll. SPf and district counsel should jointly determine the required amounts for each component of the criteria.

(4) If research indicates tax due or return delinquencies:

(a) SPf should prepare and file a proof of claim following the procedures at IRM 57(13)2.4.

(b) SPf should follow the procedures at IRM 57(13)2.35 in return delinquency cases.

(c) If corporate trust fund liabilities are outstanding, SPf should ensure that the One Hundred Percent Penalty investigation is promptly begun. SPf should issue Form 2209, Courtesy investigation, where the taxpayer's RWMS entity score is above the district cutoff score, unless there were TDA's assigned to a Revenue Officer at the time TC 520 was input. (See IRM 57(13)2.61)

(d) SPf should consider issuance of Letter 903 (DO) or, if already issued, delivery of Form 2481, Notice to Make Special Deposit of Taxes, for those debtors-in-possession who meet the criteria in LEM V Sections 621 and 623, respectively. See IRM 5620 for Trust Fund Compliance Program procedures in general.

(5) If a notice of federal tax lien was filed prior to the petition date, the government is entitled to secured claim treatment to the extent of its collateral. The government is also entitled in this circumstance to prevent unauthorized use of cash collateral that secures the government's claim. The debtor-in-possession must obtain consent or court approval in order to use cash collateral. In return for this use, the government is entitled to some form of adequate protection. Bankruptcy Code Section 361 includes a non-exclusive list of examples of what can constitute adequate protection.

(a) Where the government's secured claim is expected to be significant, SPf should send Pattern Letter P-2173(P) or an equivalent local letter to apprise the debtor-in-possession and its counsel of the Service's intention to assert its right to adequate protection.

(b) Negotiations for adequate protection payments or other concessions may be conducted by revenue officer, SPf or district counsel at the discretion of local management.

(6) If research indicates no tax due and no return delinquencies, SPf should nevertheless maintain an open case file and monitor current compliance. Frequency of review should be commensurate with the amount of the debtor's current liability. SPf need not monitor cases where the debtor has no employees but the file should be retained for ready access to TC 520 input information, in no tax due or delinquency cases, SPf should reverse the TC 520 and close the case at confirmation.

(7) Bankruptcy Rule 3003(c)(3) provides that the court will set a bar date for filing proofs of claim in each

Chapter 11 case. Because the bar date is not known well in advance as in Chapter 7, 12 and 13 proceedings, Chapter 11 cases cannot be interfiled in the chronological bar date file. Local management should assign Chapter 11 cases to individual employees or provide an alternative manual or automated control system that will ensure that bar dates are met.

57(13)5.2
Monitoring of Chapter 11 Cases Before Confirmation

(1) SPf function is responsible for monitoring the trustee's or debtor-in-possession's compliance during the pendency of the Chapter 11 proceedings. Close monitoring of employment tax compliance is essential because the government's remedies for noncompliance are necessarily more time consuming than in the case of a delinquent taxpayer not operating under the protection of the bankruptcy court.

(2) SPf should monitor the debtor's compliance with the procedures set out at (3) or (4) below. Frequency of review should be based on the debtor's current employment tax liability to ensure efficient use of SPf resources and early identification of large dollar post petition delinquencies. In determining the frequency and extent of compliance monitoring, SPf should consider whether the debtor owes pre-petition taxes and, if so, the amount(s).

(3) As of 1/9/87, the BMF has been programmed to accept input of TC 136 with a Last Return Amount Code (LRA-CD) of 1, 2, or 3. Select the LRA-CD based on the taxpayer's liability for Form 941 or Form 720 (Windfall

Profit taxes only); 1 = last return amount over $25,000, 2 = last return amount between $5,000 and $25,000 and 3 = last return amount under $5,000. If the fiduciary is liable for both Form 941 and Windfall Profit taxes, select the LRA-CD corresponding to the higher liability. The BMF will compare the taxpayer's deposits with the previous quarterly liability at several points during the current quarter depending on the indicator selected. A transcript labelled FTD-FIDUC will be issued to SPf whenever this systemic check discloses apparent substantial under-depositing. No litigation transcripts will be issued for TC 650 postings of entities to which the TC 136 indicator was input. The TC 136 also suppresses FTD Alert issuance.

(a) Use Form 3177, Notice of Action for Entry on Master File, to request input of TC 136. Enter TC 136 in the transaction code block and enter LRA-CD: 1, 2 or 3 to the right of other. See Exhibit 5700-68 for additional preparation instructions.

(b) If it is necessary to change the LRA-CD because of changes in the fiduciary's payroll, input TC 136 with the new LRA-CD. It is not necessary to input TC 137 to reverse the previous input.

(c) Input TC 137 to terminate systemic monitoring when it is no longer necessary. No LRA-CD is necessary with TC 137. TC 137 reverses all effects of TC 136. If the taxpayer will continue to have a 941 or 720 filing requirement and suppression of FTD Alerts is not appropriate, input TC 136 without the LRA-CD indicator one cycle after input of TC 137.

(d) Currently, whether TC 136 has been input cannot be determined from IDRS or master file research

because it does not appear on any transcripts. Therefore, adequate record of these inputs must be maintained in the case file or elsewhere so that TC 137 can be input when appropriate. As of February, 1988, record of TC 136 and LRA-CD inputs will be displayed on BMF entity transcripts and ENMOD.

(4) Instead of systemic monitoring via input of TC 136 with an LRA-CD, SPf may use the following procedures to monitor the post-petition employment tax compliance of Chapter 11 debtors-in-possession and trustees:

(a) Upon learning that a fiduciary has been appointed or the debtor has been continued in possession, and that the debtors business has employees:

1 Send Letter 986(DO) to advise the fiduciary of the filing and paying requirements for Federal returns and taxes (see Exhibit 5700-70).

2 Supply the fiduciary with Form 6123. Verification of Fiduciary's Federal Tax Deposit, to ensure verification of deposits (see Exhibit 5700-71).

3 Review the fiduciary's compliance in filing returns and paying taxes. This can be done by one of the following methods:

a Check IDRS

b Manual monitoring of deposits using Form 6123 (Exhibit 5700-71).

c Manual monitoring via litigation transcripts.

4 Pattern Letter P-636 (Exhibit 5700-72) may be used for initial contact when fiduciary has failed to pay/deposit.

5 Pattern Letter P-635 (Exhibit 5700-73) may be used for initial contact when a fiduciary has failed to file.

(b) Monitoring of fiduciary compliance may be accomplished by using Collection field personnel. However, this should only be done if SPf determines that field contact is essential and that field contact by SPf advisors is impracticable. SPf should initiate monitoring by field employees by issuing Form 2209. When initiating Form 2209, SPf will include remarks specifying the purpose of the investigation and the actions required. SPf should also include a statement explaining what to do in the event of a non-compliance. That is, it should state whether the field employee should attempt to secure compliance or whether the investigation should be returned to SPf for follow-up in the bankruptcy court proceeding.

(c) Fiduciary trust fund accounts that are monitored by SPf, or by field personnel, should be excepted from the FTD Alert program. At the time that SPf determines a case is to be monitored for trust fund compliance, SPf should request input of TC 136 (if taxpayer meets the criteria in Exhibit 600-1, Section (3)(a) of LEM V) to suppress the issuance of FTD Alerts during the period that the fiduciary's account is under SPf control. When the case is closed, the fiduciary dismissed, or the taxpayer's case is converted to Chapter 7, SPf will request the input of TC 137 to reverse the TC 136.

(5) All communications received from the trustee or debtor-in-possession and all notices received from the courts should be reviewed upon receipt and, if warranted, a copy should be forwarded to district counsel.

(6) If review of the case file reveals that the federal tax deposits are apparently insufficient, SPf should contact the debtor-in-possession or trustee or, if appropriate, the debtor's representative. If the FTD's are insufficient, inform the debtor or his/her representative that all accrued taxes must be deposited immediately and advise him or her that if noncompliance persists the Service will seek conversion or dismissal of the case and assert the 100-Percent Penalty.

(7) Post petition balance due or delinquent returns should be worked as 'TDA's' and 'TDI's' within the constraints of the Bankruptcy Code.

(a) Contact the debtor or his attorney (or send Pattern Letter P-1931, Exhibit 5700-86, on low dollar cases) and demand immediate full payment or filing of the return with full payment. Set a definite deadline. Field contact should be made on high dollar cases. Local management should set the criteria based on workload and staffing. If contact by SPf personnel is impractical due to distance, Form 2209 should be initiated for Revenue Officer or Revenue Representative contact.

(b) Advise the debtor that if the delinquency is not cured by the agreed date, the Service will request that the court convert or dismiss the case and that the debtor's plan cannot be confirmed unless all post petition taxes are paid in full.

(c) If the debtor is unable to immediately full pay all post petition taxes short term extensions of time may be considered. No extension should be granted if the debtor is obviously unable to pay all current taxes or in cases of flagrant delinquency.

(d) If the delinquency is not resolved, SPf should prepare and file Form 6338A, Request for Payment of Internal Revenue Taxes and, if the amount outstanding exceeds the amount stated in 7(16)4.1 of LEM V, refer the matter to district counsel. In cases involving liabilities less than this amount, SPf should consider a referral to district counsel if there is a potential to further accrual of significant liabilities.

(8) Procedures in (6) and (7) above may be modified as local conditions require. Generally, in districts where the government's motions to convert or dismiss are promptly and favorably acted upon, SPf should expend less resources in attempting to secure compliance prior to referral. Conversely, in districts where debtors have successfully contested such motions or delayed action on them, an early 'routine' referral may be futile. SPf in these districts should take all the actions listed in (6) and (7) above and thoroughly document the results of contacts with non-complying debtors. Chief, SPf and district counsel should jointly determine what efforts SPf should make to secure compliance prior to referral, the required documentation for referrals and referral criteria. All referrals of Chapter 11 cases to district counsel for action on postpetition noncompliance must include:

(a) A statement as to whether the business is still operating.

(b) An estimate of the debtor's current quarterly liability for employment taxes based on number of employees, size of payroll or, if no better information is available, last return amount, and

(c) Copies of any proofs of claim and request for payment filed in the proceeding.

(9) SPf and district counsel should consider whether it would be more efficient, in cases involving post-petition non-compliance, for SPf to prepare an entire referral package. This would include the standard motion or referral letter (to the U.S. Attorney), notice of the motion and any other documents that are routinely required.

(10) SPf's in pilot districts should report post petition non-compliance to the U.S. Trustee in accordance with the local agreement.

(11) Where agreements to do so have been reached, SPf may initially report post-petition non-compliance to the bankruptcy court's estate administrator. If this does not resolve the matter within a reasonable time, SPf should refer the case to district counsel.

57(13)5.3
Processing of Chapter 11 Plans

(1) SPf should send Letter 1715(DO), (Exhibit 5700-76), early in the proceeding to inform the debtor in possession of the minimum requirements for plan confirmation.

(2) Rule 3017(d) provides that upon approval of the disclosure statement, a copy of the plan and the disclosure statement will be sent to all creditors. Rule 2002(b) provides for twenty-five days notice to creditors of the hearing on confirmation. SPf should contact the court, through district counsel if necessary, if plans and disclosure statements are not received timely.

(3) Upon receipt of the plan, SPf should check IDRS and other sources as appropriate, and review the case file to ensure that all outstanding liabilities have been included on a filed proof of claim or request for payment. SPf should contact Examination Division when a Chapter 11 plan is received, whether or not there has been previous communication. The purpose of this contact is to ensure that, if any periods are under examination, a proof of claim will be filed with respect to those periods. Secondly, to determine whether any open examinations have been concluded. Any unliquidated claims must be finalized prior to plan confirmation or they will be estimated for purposes of distribution under the plan. Liabilities that are not provided for will not be included in the distribution and may be discharged.

SPf should also research IDRS and other sources as appropriate and contact Examination Division if a bar date is set by the court before approval of the disclosure statement and distribution of the plan to creditors.

(4) SPf should review the plan to ensure that the government's claim is treated as required by the Bankruptcy Code. SPf should refer the case to district counsel if the plan:

(a) does not provide for all administrative and "gap" period taxes to be paid in full, in cash, upon the effective date of the plan (B/C section 1129(a)(9)(A)).

(b) does not provide for all priority taxes to be paid in full, in cash, within six years from the date of assessment of the tax (B/C section 1129(a)(9)(C)).

(c) proposes to pay all priority taxes, in full, in cash, within six years from the date of assessment with minimal installment plans over the life of the plan and a balloon payments at the end.

(d) will have the effect of giving unsecured general creditors, at any given point in time during the reorganization, a higher cumulative distribution than the Government is receiving for its priority claim.

(e) involves a debtor who is ineligible to file under Chapter 11 (B/C section 109(d)).

(f) requires formal acceptance by the Government.

(g) proposed to distribute property to the Government (B/C section 1129(a)(7)).

(h) appears, in any way, to jeopardize the Government's interest.

(i) does not provide for payment of 'present value' interest on priority and secured tax claims that are to be paid in installments. (Bankruptcy Code sections 1129(a)(9)(C) and 1129(b)(2)(A).

(5) If the plan meets the requirements of the Bankruptcy Code, SPf should next determine whether it is

workable. SPf should consider the disclosure statement and any other readily available source of information in making this determination. If it is apparent that the debtor cannot complete the plan as proposed, SPf should refer it to district counsel. The likelihood of future liquidation or further re-organization is a ground for denial of confirmation under B/C section 1129(a)(11).

(6) All negotiations with the debtor or representative will be conducted by either SPf, district counsel, or the Department of Justice, as appropriate. All documents, other than correspondence, dealing with plans of reorganization are to be prepared by district counsel or the Department of Justice, as appropriate.

(7) If a debtor approaches SPf with a prepetition solicitation for formal acceptance of a proposed plan, the debtor will be referred to district counsel. However, a bankruptcy case file will not be opened until a petition is filed.

57(13)5.4
Postconfirmation Procedures

57(13)5.41
Monitoring the Plan

(1) Upon confirmation a corporate or partnership debtor is discharged of all preconfirmation debts and is bound only to make the payments required under the plan. An individual debtor is not discharged from the debts excepted from discharge by B/C 523. See IRM 57(13)1.23(13). No actions such as abatements of tax or releases of lien should be taken unless specifically ordered by the court because a subsequent default may

result in conversion or dismissal rendering the discharge ineffective. A plan or order that appears to require such action should be referred to counsel unless its intent and scope are completely clear.

(2) TC 520 CC 85 through 88, if present should be reversed and replaced with TC 520 CC 81 because the automatic stay terminates with the discharge. This will prevent offset to periods provided for by the plan and allow normal assessment, notice and TDA processing of subsequent liabilities. Any refunds that the debtor becomes entitled to will have to be generated by use of Form 5792.

(3) Any unpostable returns or adjustments should be noted for assessment on receipt of the next Weekly Bankruptcy List. See IRM 57(13)3.162. Similarly, in individual Chapter 11 cases, unassessed 100-Percent Penalties should be forwarded for assessment.

(4) Payments under the plan should be applied as directed by the court or in the usual order as stated in IRM 57(13)4.3. Payments should be applied to a period until it is 'full paid' according to the terms of the plan. This means payment of the allowed amount of the claim, usually tax plus interest and penalties to the petition date, and 'present value' interest on the claim from the date of confirmation. When all liabilities have been 'full paid' SPf should abate the remaining balances, if any, and close the case whether or not the debtor's plan has been fully completed. SPf should generally not abate the balance on individual modules when other periods have not yet been paid under the plan.

(5) SP function is responsible for monitoring Chapter 11 payment plans. A payment log should be established in order to keep a current record of the debtor's compliance with the plan.

TOUCHE ROSS & CO.
CERTIFIED PUBLIC ACCOUNTANTS

June 5, 1986

Mr. Theodore B. Gould
President
Holywell Corp.
Post Office Box 6279
Charlottesville, VA 22906

Dear Mr. Gould:

This letter is in response to a request by Ed Schumacher regarding the preparation of the tax returns for Miami Center Limited Partnership (MCLP) and Holywell Corporation and Subsidiaries (Holywell).

It is our understanding as a result of substantial consolidation the cash collateral of $28,986,112, held pursuant to a court order of December 13, 1984 was contributed to the confirmed plan. These funds were transferred to the liquidating trustee on October 10, 1985. Prior to the liquidating trustee being empowered, the funds had been invested in U.S. Treasury Securities and substantial amounts of interest were earned. Ed has asked us to look into the taxability of the interest income earned on the funds held by the liquidating trustee. It is also our understanding that all items relating to your individual tax matters will be handled by the accounting firm of Hester, Roth & Calfaway.

Based on the above facts, we believe that no new taxable entity has been created by the bankruptcy proceedings for MCLP or Holywell. We further believe that the interest earned on the invested funds should be allocated to the taxable entity that contributed these funds. We will

ensure that this income is included in the tax returns for the entities we prepare.

At this time there is some confusion regarding the scope of our employment under the Bankruptcy Court's Order. We have been advised by our attorney not to proceed with any further processing of tax returns until the position of the liquidating trustee has been clarified regarding this matter. Although we believe that tax work clearly is within our scope as outlined by the Court, until this matter is clarified, we cannot proceed further. As you know, we have already invested time examining some of the issues relating to the return.

* * *

If you should have any questions or comments please do not hesitate to contact us.

Very truly yours,

/s/ Clifford G. Benson, Jr.
Clifford G. Benson, Jr.

CB/twp
4999T

HOLYWELL CORPORATION
P.O. Box 6279
Charlottesville, Virginia 22906
(804) 295-7125

2564-B Ivy Road
Charlottesville, Virginia 22901

March 11, 1987

VIA FEDERAL EXPRESS

Irving M. Wolff, Esq.
Holland & Knight
1200 Brickell Avenue, 14th Floor
Miami, Florida 33131

Re: Miami Center Liquidating Trust
As a Taxable Entity

Dear Irving:

Since the Miami Center Liquidating Trust is not a taxable entity, the interest earned on the funds deposited by the Liquidating Trustee in Certificates of Deposit, Treasury Bills, and Repurchase Agreements has been reported as taxable income in 1985 in accordance with Edgar Schumacher's attached memorandum. The taxable interest income has been segregated to the accounts of Twin Development Corporation, Holywell Corporation, the Miami Center Limited Partnership, and myself. The interest income for 1986 will also be reported separately by each of the above taxable entities.

Sincerely yours,

Theodore B. Gould

fm
Attachments

cc: Edgar Schumacher, Jr.

MEMORANDUM

DATE: March 10, 1987

TO: Theodore B. Gould

FROM: Edgar Schumacher, Jr.

RE: ALLOCATION OF INTEREST EARNED ON TRUSTEE'S BANK ACCOUNTS 1985

For the filing of the debtors' respective tax returns for 1985, it was necessary to determine the correct amount of interest earned on their funds. This had to include the period of 10/10/85 through 12/31/85 while their funds were in the Trustee's accounts. I did the analysis to determine the amounts earned by each debtor.

For my analysis, I used Arthur Andersen's summary of receipts for the period 10/10/85 – 4/30/86. I then analyzed the individual bank statements for each account for these months and also considered the interbank transfers among these accounts.

The attached schedule with supporting schedules indicates the amounts of interest earned by the respective taxpayers for 1985 and the first four months of 1986. For 1986 tax returns, I will do a similar analysis for all of 1986.

For 1985, you earned $16,908.40 in interest from the Trustee accounts and included this amount in your 1985 tax return form #1040.

For 1985, MCLP earned $124,480.33 in interest from the Trustee accounts and this was included in the 1985 MCLP partnership tax return form #1040.

As you know, we are working on the accounting transactions for the tax reporting fiscal year of 7/31/86

for both Holywell Corporation and Twin Development Corporation. Each corporation will be reporting its respective amounts on its form #1120 corporation tax return.

fm
Attachment

HOLYWELL CORPORATION
P.O. Box 6279
Charlottesville, Virginia 22906
(804) 295-7125

2564-B Ivy Road
Charlottesville, Virginia 22901

March 19, 1967

Mr. Fred Stanton Smith, Liquidating Trustee
Miami Center Liquidating Trust
c/o The Keyes Company
100 North Biscayne Boulevard, 20th Floor
Miami, Florida 33132

Re: Interest Withheld in 1985

Dear Fred:

During the 1985 period of your trusteeship, Sun Bank withheld $8,414.98 of interest earned on the cash investments and deposited it with the IRS. The third report dated 8/30/86 indicated that steps had been taken to have this amount refunded. To date, I have seen nothing to indicate that this in fact has been done.

Since the Miami Center Liquidating Trust is not a taxable entity, all interest earned is allocable to the appropriate debtors and no interest should have been withheld by the Bank. The appropriate forms should be filed to get a refund of the $8,414.98.

If, in fact, the Trust had a responsibility to file a fiduciary return (which we believe it does not), those returns are due on a calendar year basis. You therefore would have had to file at the end of 1985 and at the end of 1986. You did not and have not been advised to do so. However, the Debtors, as the appropriate taxable entities, have filed tax returns including the 1985 interest income earned. It follows, then, that your advisors' internal opinion is that the Trust is not a separate taxable entity.

I do not understand how seventeen months have elapsed and this tax matter is still considered an open question and not resolved.

For your information, enclosed is recent correspondence to Irving regarding this item.

We all want to get this Trusteeship closed. This issue is one of the impediments that must be resolved to achieve closing.

Sincerely yours,

/s/ Edgar Schumacher, Jr.
Chief Financial Officer

fm
cc: Irving Wolff
Rudy Pittaluga

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 87-0968-CIV-DAVIS

IN RE:

HOLYWELL CORPORATION,

Debtor.

UNITED STATES OF AMERICA,

Appellant,

vs.

HOLYWELL CORPORATION, etc.,

Appellees.

ORDER AFFIRMING BANKRUPTCY COURT'S ORDER

JURISDICTION

This Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 158(a). This statute provides that "[t]he district courts . . . shall have jurisdiction of appeals from all final judgments, orders, and decrees of bankruptcy courts."

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Bankruptcy Court erred in striking claim numbers 509 and 512 as untimely;

2. Whether 11 U.S.C. §726(a)(3) applies to tardily-filed claims in a Chapter 11 proceeding; and

3. Whether the trustee waived the right to strike as untimely claim numbers 509 and 512.

STANDARD OF REVIEW

A bankruptcy judge's conclusions of law are freely reviewable on appeal. *Machinery Rental Inc. v. Herpel*, 622 F.2d 709, 713 (5th Cir. 1980); *In re Duque*, 48 B.R. 965 (Bankr. S.D.Fla. 1984). However, findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses. Bankruptcy Rule 8013.

STATEMENT OF THE CASE

Debtor, HOLYWELL CORPORATION (hereinafter "HOLYWELL") and four related entities initiated Chapter 11 bankruptcy proceedings on August 22, 1984. Previously, on July 25, 1984, the Internal Revenue Service ("I.R.S.") had mailed a notice of a $489,063.00 deficiency to HOLYWELL for the tax year ending July 31, 1980. HOLYWELL's schedule of liabilities filed with its bankruptcy petition acknowledge a claim belonging to the I.R.S., but listed the claim as "disputed, contingent, and unliquidated."

Two months after the initiation of bankruptcy, HOLYWELL filed a petition challenging the asserted tax deficiency in the United States Tax Court. The I.R.S. sought dismissal of HOLYWELL's petition for lack of jurisdiction on the basis that it had been filed in violation of 11 U.S.C. §362(a), the automatic stay provision. On August 6, 1985, HOLYWELL moved the Bankruptcy Court for stay relief with respect to the issues raised in the tax case, and on September 4, 1985 the motion was granted. Subsequently, the Tax Court dismissed the

HOLYWELL petition, and a second petition was submitted. The I.R.S. has answered the second petition and the income tax claim is presently awaiting resolution before the Tax Court.

The Bankruptcy Court established January 15, 1985 as the bar date for filing creditor claims. Although the I.R.S. received timely notice of the bar date, it filed claim no. 509 on October 16, 1985 for $3.2 million in income taxes, interest and penalties owed by HOLYWELL. A second claim, claim no. 512, was filed on November 6, 1985 as an amendment to 509, increasing the amount to $3.4 million.

On October 3, 1986, the Trustee in bankruptcy filed a Motion to Strike claims 509 and 512 on the ground that these were untimely filed. The Bankruptcy Court, per Judge Thomas C. Britton, conducted a hearing on the Trustee's Motion on November 6, 1986. At the hearing, counsel for the United States argued that the Motion to Strike should be denied on three separate grounds: (1) the debtor waived the late-filed defense to the income tax portion of claims 509 and 512; (2) claims 509 and 512 are allowable amendments of a timely-filed informal claim; and (3) in a liquidating Chapter 11 proceeding, a late claim is entitled to distribution under 11 U.S.C. §726(a)(3). *See* Appellant's Brief at 7.

Judge Britton found no merit in the first and third defenses. Transcript of 11-10-86 hearing at 13, 14, 27. On November 3, 1985, the Bankruptcy Court entered its order striking claims 509 and 512 as untimely. That order is the subject of this appeal.

DISCUSSION

1. Whether the Bankruptcy Court Erred in Striking Claims 509 and 512 as Untimely

Bankruptcy Rule 3003(c)(2) requires that a creditor whose claim is scheduled as "disputed, contingent, or unliquidated," file a proof of claim before the expiration of the bar date in order to preserve his claim and receive distribution from the debtor's estate. Appellant, UNITED STATES OF AMERICA, contends that the October 22, 1984 petition filed by HOLYWELL in the Tax Court in response to the July 25, 1984 I.R.S. notice of deficiency, together with the I.R.S.' answer to that petition, constituted a timely-filed "informal" claim, properly amendable by the post bar date claims. This argument is not compelling.

Admittedly, the proof of claim need not be "letter perfect" so long as it "apprise[s] the court of the existence, nature, and amount of the claim." *In re South Atlantic Financial Corp.*, 767 F.2d 814, 819 (11th Cir. 1985), *cert. denied, Biscayne 21 Condominium, Inc. v. South Atlantic Financial Corp.*, 475 U.S. 1015 (1986). However, before a party may amend a proof of claim, "there must be something filed in the bankruptcy court capable of being amended." *Id.*, citing *In re International Horizons, Inc.*, 751 F.2d 1213, 1216 (11th Cir. 1985). The debtor's knowledge of the claim, standing alone, does not permit the filing of an amended claim. *Id.*

Here, the I.R.S. filed no documents in Bankruptcy Court detailing its claim prior to the bar date. The Debtor's filing of a petition in Tax Court and the I.R.S.'

answer thereto clearly do not constitute an informal proof of claim, as these were filed with the Tax Court, not the Bankruptcy Court. The notice of deficiency served on HOLYWELL before bankruptcy is also not the equivalent of an informal claim. In *In re International Horizons, Inc.*, 751 F.2d at 1218, the Eleventh Circuit rejected a similar argument that I.R.S. discussions before bankruptcy with a debtor concerning alleged tax liability, coupled with the filing after the bar date of a notice of deficiency, constituted an informal proof of claim. Even assuming that the filing of a notice of deficiency with a debtor is equivalent to filing a proof of claim in Bankruptcy Court,[1] it presumes that the filing occurred post-petition. It cannot be said that the filing of a paper before bankruptcy, as occurred here, constitutes a filing in Bankruptcy Court.

The Bankruptcy Court's only pre-bar date notice of the I.R.S.' claim is the Debtor's bankruptcy petition, which lists Appellant's disputed claim. The Debtor's bankruptcy petition does not satisfy the requirements for amendable informal proofs of claims. *See In re South Atlantic Financial Corp.*, 767 F.2d at 819. Because Appellant had ample opportunity to assert its claim timely, the

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[1] The Court agrees with Judge Britton's finding that such an assumption is contrary to the "misdelivery" requirement of Bankruptcy Rule 5005(b). This rule treats proofs of claims filed with a trustee or debtor-in-possession as having been filed with the bankruptcy court *only* when it is clear that the creditor intended to file its proof of claim with the bankruptcy court, but erroneously delivered it to the trustee or debtor. *See In Re South Atlantic Financial Corp.*, 767 F.2d at 819, n.7, citing *In re Evanston Motor Co.*, 735 F.2d 1029, 1031-32 (7th Cir. 1984).

Bankruptcy Court was correct in striking the "formal" claim.[2]

2. Whether 11 U.S.C. §726(a)(3) Applies to Tardily-Filed Claims in a Chapter 11 Proceeding

Appellant contends that even if claims 509 and 512 are considered to be tardily filed, the income tax portion of those claims should be allowed pursuant to 11 U.S.C. §726(a)(3), as tardily-filed claims. In pertinent part, §726(a)(3) provides that the bankruptcy estate shall be distributed "in payment of any allowed unsecured claim proof of which is tardily filed under §501(a) of this title, other than a claim of the kind specified in paragraph 2(c) of this subsection." The UNITED STATES relies on *In re Saymans, Inc.*, 82-2 U.S.T.C. §9703 (Bankr. N.D.Ga. 1982) and *In re Compton Corp.*, 40 B.R. 875 (Bankr. N.D. Texas 1984) for the proposition that §726(a), although found in Chapter 7 of the Bankruptcy Code, applies in this liquidating Chapter 11 proceeding. The *Saymans* court, in a Chapter 11 proceeding, subordinated the Government's tardily-filed claims under §726(a)(3) to the claimants who had timely-filed claims. *In re Saymans, Inc.*, 82-2 U.S.T.C. ¶9703 at 85,539. In *Compton*, the court held that a reorganization proceeding was similar to, and should be treated as, a liquidation case under Chapter 7. *In re Compton*, 40

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[2] Debtor's filing for stay relief in Bankruptcy Court also does not suffice as an informal proof of claim capable of amendment. It was filed after the bar date and does not set "forth in great detail the nature of [the] claim." *In re South Atlantic Financial Corp.*, 767 F.2d at 819, citing *In re Guardian Mortgage Investors*, 15 B.R. 284, 285-87 (Bankr. M.D.Fla. 1981).

B.R. at 877. The court in *Compton* found that the "best interests of creditors test" of §1129(a)(7) of Title 11 of the Code[3] requires the court to consider the distribution scheme set out in §726. *Id.*

The cases Appellant relies upon are unpersuasive. *Sayman* provides no explanation for its application of §726(a)(3) in a liquidating Chapter 11 proceeding. More importantly, the language of 11 U.S.C. §103(b) is clear that §726(a)(3) is directly applicable only to cases in Chapter 7. *See also Matter of Colin*, 44 B.R. 806, 808 (Bankr. S.D.N.Y. 1984). Absent statutory or controlling decisional law to the contrary, this Court will follow §103(b)'s directive.

The Court also rejects the argument that §1129(a)(7)(A)(ii) of Title 11 incorporates §726(a). Although §1129's legislative history states that the court will have to consider the various subordination provisions of §726(a),[4] absent specific statutory authorization "neither the Code nor the legislative history suggests that in making the comparison between distribution under the proposed Chapter 11 plan, and the statutory distribution pursuant to §726(a)," a court should equalize the two distributions by reading the provisions of one into the

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[3] Section 1129 of Title 11 provides that each holder of a claim or interest who does not accept a plan "will receive or retain under the plan on account of such claim or interest property of a value . . . that is not less than the amount that such holder would so receive . . . if the debtor were liquidated under Chapter 7. . . . " 11 U.S.C. §1129(A)(7)(ii).

[4] *See* House Rep. 95.595, 1st Sess. 412-13 (1977), U.S. Code Cong. & Admin. News, 5787, 6368 (1978).

other. *Matter of Colin*, 44 B.R. at 808. Section 1129(a)(7) merely requires that a court not confirm a reorganization plan if a dissenting creditor would receive more because of his Chapter 7 claim than he would under the plan. *Id.* In the present case, the record reflects that confirmation of the Debtor's plan is not at issue, nor are these dissenting creditors before the Court at this time. Thus, even were the statutory interpretation relied upon by Appellant correct, §1139(a)(7)(A)(ii) is inapplicable in this proceeding. The Bankruptcy Court correctly determined that the I.R.S.' reliance on §726(a)(3) is without merit.

3. Whether the Trustee Waived the Right to Strike Claims 509 and 512 as Untimely

Appellant's final argument is that the bar date is akin to a statute of limitations defense which must be timely pleaded. Thus, it is submitted that HOLYWELL waived the right to object to the income tax portion of Claims 509 and 512 because it waited eight months before challenging these claims.

Contrary to Appellant's argument, HOLYWELL has not waived its right to object to the claims. The Bankruptcy Code and Rules do not set a specific time limitation for the trustee to object to an untimely proof of claim. *See generally*, 8 *Collier on Bankruptcy*, §3007.03 at 3007-7 (15th Ed. 1987). Appellant has cited no case to support this proposition.

In light of the foregoing, this Court AFFIRMS the Bankruptcy Court's Order of November 3, 1985, striking Claims 509 and 512 as untimely.

DONE AND ORDERED in Chambers at Miami, Florida this 20th day of November, 1987.

/s/ Edward B. Davis
EDWARD B. DAVIS
United States District Judge

cc: Alvarez LeCesne, Esq.
Herbert Stettin, Esq.
Irving Wolfe, Esq.
Betsy Cox. Esq.

CA/vg

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Judge Thomas C. Britton

In the Matter of HOLYWELL CORPORATION, Debtor.	NO. 84-01590

MOTION FOR SUBSTANTIVE CONSOLIDATION

July 18, 1985

The above-entitled cause came on for Hearing before the Honorable Thomas C. Britton, one of the Judges of the United States Bankruptcy Court, Room 1406, 51 Southwest 1st Avenue, Miami, Dade County, Florida, at a session of said Court commencing at 9:30 o'clock a.m. on Thursday, July 18, 1985, and the following proceedings were had:

Reported By: Janice Mauldin

* * *

The last point I want to touch on are the tax consequences. In this area I readily concede that I am a babe in the woods and haven't the foggiest notion of what the tax consequences would be on the particular decision that we are talking about right at the moment.

If a modification of this plan or any other adjustment can be made to alleviate adverse tax consequences for the debtors, then I think that a request for such a modification ought to be respected and honored and I would, so

long as I have the discretion to do so, intend to accomplish that result and I don't mean to foreclose it today. I think all of us have recognized in our discussion this morning that there might be tax consequences, we are not certain if we have considered all that we could do to alleviate the adverse tax consequences, and if somebody will bring them to our attention, through you, I imagine, Mr. Kent, we would want to reconsider that, but on the basic question of whether or not I should doom the bank's plan in its present form by just saying that there is no legal predicate here and no justification for me to allow the version of consolidation that is embodied in that plan, I am not willing to take that step today and I am willing to go along with the approach the bank has offered.

Having said all that, let me ask, Mr. Salter, you or Mr. Ziegler, to draft an order that you think you will be in a position to defend without putting me in the position of saying more than I have said in the hearing before us here today. Give Mr. Kent an opportunity to review it.

Mr. Kent, unless that order takes unfair advantage of you, and unless you tell them that it does, I will sign the order. If it does, let me hear from you, I don't want to sandbag you in that fashion, but, quite frankly, I don't want to take the time to sit down and try, in my own words, to enter an order that would reflect my ruling and, at the same time, not go beyond the scope of that.

Is there anything else that we ought to discuss this morning while we are concentrating on this aspect of the case?

MR. ZIEGLER: As to this aspect, no, your Honor, I think that that will cover it and I am sure that we can work out an order with Mr. Kent that will deal with your Honor's sensitivities and concerns. I don't intend, by your having ruled, to now try to jam anything down. We would still cooperate –

THE COURT: Oh, I trust you wouldn't. Mr. Kent has never done that, neither have you, but I wanted to make it clear, while we are talking on the record, that I didn't want that to happen.

* * *

UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF FLORIDA

CHAPTER 11 Proceedings

IN RE:	)	CASE NOS. 84-01590-BKC-TCB
	)	84-01591-BKC-TCB
HOLYWELL	)	84-01592-BKC-TCB
CORPORATION,	)	84-01593-BKC-TCB
et. al.	)	84-01594-BKC-TCB
	)	
Debtors	)	

AMENDED CONSOLIDATED PLAN OF REORGANIZATION PROPOSED BY THE BANK OF NEW YORK

The Bank of New York submits the following Plan of Reorganization:

* * *

IV. MEANS FOR EXECUTION OF THE PLAN

Sale of Miami Center

The Plan would be implemented by a sale of Miami Center to BNY or its designee for a purchase price of $255,600,000 pursuant to a contract of sale substantially in the form of Exhibit A annexed hereto (the "Contract of Sale"). Within 5 business days after the Effective Date, the Trustee and BNY or its designee would execute the Contract of Sale, which requires a closing of title within 45 days after the Effective Date.

The purchase price would be paid and applied in the following manner:

(a) BNY would receive a credit for the amount of the BNY Debt plus expenses to the Miami Center Closing Date, which, assuming a closing

date of June 1, 1985, and no change in BNY's Prime Rate, would be $236,587,618.

(b) BNY would pay the balance of the purchase price in cash (approximately $19,012,382) to the Trustee. The Trustee shall be required to: (i) pay (if requested by BNY, under protest) from such cash the real estate taxes for 1983 and 1984, and pay the Debtors' pro rata portion of the real estate taxes for 1985 due to the Miami Center Closing Date.

(ii) pay (if requested by BNY, under protest) from such cash the Personal Property Taxes for 1983 and 1984, and pay the Debtors' pro rata portion of the personal property taxes for 1985 due to the Miami Center Closing Date.

(iii) take all steps and to make all payments, from such cash (and, if necessary, from the Washington Proceeds) to exercise the purchase option in the MCJV FF&E leases, and to obtain title to the FF&E covered by the MCJV FF&E Leases.

Title to Miami Center would be delivered to BNY or its designee by the Trustee free and clear of all leases, liens, encumbrances and contracts affecting Miami Center, except those set forth on Exhibit B attached hereto, and except as provided in Article XI hereof. At the closing BNY or its designee would receive fee title to the FF&E covered by the Gould FF&E Leases, as a result of the merger of such leases effected by the substantive consolidation of the estates (or Gould, any of the Debtors, or the Trustee would cause any of the Gould Entities that are Lessors under the Gould FF&E Leases to convey directly to MCLP the FF&E covered by such Leases) and would receive fee title to the FF&E covered by the MCJV FF&E Leases as a result of the exercise of the purchase

option on the Miami Center Closing Date. On the Effective Date all other liens and encumbrances, including the mechanics liens and judgment liens on Miami Center are transferred and shall attach to the Trust Property, including the Washington Proceeds, subject to the security interests of BNY securing the BNY Holywell Loan. All contracts affecting Miami Center that are not to be assumed will be rejected in accordance with Article XI hereof. Upon the passing of title of Miami Center to BNY, BNY's lien and security interest in the Washington Proceeds and the other collateral shall be limited to the BNY-Holywell Loan, and the balance of the Washington Proceeds will be available for distribution to Creditors.

BNY may elect to retain its mortgages on and security interests in Miami Center after the passing of title; however, upon the passing of title, the personal liability of the Debtors on the obligations that are secured by such mortgages and security interests shall be released.

* * *

VI. TREATMENT OF CLAIMS AND DISTRIBUTION

The cash portion of the Trust Property, together with interest thereon, shall be distributed by the Trustee to satisfy the interest of each Class as defined above (other than the BNY Class 2 Claim) in the following manner and order of priority:

1(a). Class 1 Claims are not impaired. As soon as practicable after the Miami Center Closing Date, all allowed Class 1 Claims which have been incurred prior to the Effective Date and which have been approved by a Final Order of the Court shall be paid by the Trustee in

full, unless the holder of any such Class 1 Claims shall have agreed to a different treatment of such Class 1 Claims in which case the holder of such Class 1 Claims shall be paid in accordance with such agreement.

1(b). Class 1 Claims which have been incurred prior to the Effective Date and which have not been approved by the Court on or before the Miami Center Closing Date shall be paid by the Trustee, in full as soon as practicable after the same have been approved by a Final Order of the Court, unless the holder of any such Class 1 Claims shall have agreed to a different treatment of such, in which case the holder of such Class 1 Claims shall be paid in accordance with such agreement.

1(c). Class 1 Claims incurred subsequent to the Consummation Date shall be paid by the Trustee, in full, as soon as practicable after the same have been approved by the Creditors Committees unless the holder of any such Class 1 Claim shall have agreed to a different treatment of such Claim, in which case the holder of such Class 1 Claim shall be paid in accordance with such agreement.

2. The Class 2 Claim is impaired. The Class 2 Claim consisting of the principal of the of BNY Debt and interest thereon at the pre-default contract rate to the Miami Center Closing Date shall be paid and satisfied in accordance with the provisions of Article IV hereof.

3. The Class 3 Claim is impaired. As soon as practicable after the Miami Center Closing Date, the Class 3 Claim consisting of the principal of the BNY Holywell Loan and interest thereon at the pre-default contract rate shall be paid.

4. Class 4 Claims are impaired. As soon as practicable after the Miami Center Closing Date, all Allowed Class 4 Secured Claims shall be paid in full as to principal and shall be paid interest at the rate of 10% per annum.

* * *